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No.

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In the Supreme Court of the United States

OCTOBER TERM, 1990

MANUEL LUJAN, JR., SECRETARY OF THE INTERIOR, PETITIONER

v.

DEFENDERS OF WILDLIFE, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether respondents have standing to challenge a regulation jointly issued by the Secretary of the Interior and the Secretary of Commerce that merely interprets the statutory obligations of federal agencies under Section 7(a)(2) of the Endangered Species Act of 1973, 16 U.S.C. 1536(a)(2), where respondents have not challenged any specific action by an agency upon whom the statutory obligations actually fall.

2. Whether the Secretaries' construction of Section 7(a)(2) of the Endangered Species Act, which requires federal agencies, in consultation with the appropriate Secretary, to ensure that their actions are not likely to jeopardize any endangered or threatened species, as inapplicable to activities in foreign countries, is consistent with the Act.

PARTIES TO THE PROCEEDING

The petitioner is Manuel Lujan, Jr., in his official capacity as Secretary of the Interior. The respondents are Defenders of Wildlife, Friends of Animals and Their Environment, and the Humane Society of the United States.

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DEFENDERS OF WILDLIFE, ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Solicitor General, on behalf of the Secretary of the Interior, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App., *infra*, 1a-20a) is reported at 911 F.2d 117. The opinion of the district court (App., *infra*, 21a-32a) is reported at 707 F. Supp. 1082. Prior opinions of the court of appeals (App., *infra*, 33a-54a) and the district court (App., *infra*, 55a-64a) are reported at 851 F.2d 1035 and 658 F. Supp. 43, respectively.

JURISDICTION

The judgment of the court of appeals was entered on August 10, 1990. A petition for rehearing was denied on December 10, 1990. App., *infra*, 65a. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY AND REGULATORY PROVISIONS INVOLVED

Relevant provisions of the Endangered Species Act of 1973, as amended, 16 U.S.C. 1531 *et seq.*, and 50 C.F.R. 402.01, are set forth at App., *infra*, 66a-80a.

STATEMENT

1. a. This case involves a challenge by the three respondent organizations to an administrative interpretation of the geographic reach of Section 7(a)(2) of the Endangered Species Act (ESA), 16 U.S.C. 1536(a)(2). Section 7(a)(2) requires "[e]ach Federal agency * * *, in consultation with and with the assistance of the Secretary [of the Interior or Commerce, as appropriate, to] insure that any action authorized, funded, or carried out by such agency * * * is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical."

The Fish and Wildlife Service (FWS) and the National Marine Fisheries Service (NMFS), on behalf of the Secretary of the Interior and the Secretary of Commerce, have issued joint regulations interpreting Section 7 and announcing procedures through which they are available to consult with other agencies about actions covered by the ESA. 50 C.F.R. Pt. 402 (1989). As originally promulgated in 1978, the regulations interpreted Section 7(a)(2)'s requirement that federal agencies engage in such consultation to ensure that their actions do not jeopardize the continued existence of a listed species as applying to actions "in the United States, upon the high seas and in foreign countries." 43 Fed. Reg. 870, 874 (adding 50 C.F.R. 402.01).

On the other hand, the Interior Department took the position as early as 1976, in an opinion by the Assistant

Solicitor for Fish and Wildlife, that the Secretary's responsibility under Section 7(a)(2) to designate the "critical habitat" of listed species *does not* apply in foreign countries. The Assistant Solicitor found it significant that Section 7(a)(2) requires the Secretary to consult with affected States regarding critical-habitat designations but makes no mention of foreign governments; that by contrast, Sections 4 and 8 of the ESA, which authorize the listing of foreign species and furnishing of assistance to foreign governments to preserve their threatened and endangered species, expressly provide for consultation with foreign governments (16 U.S.C. 1533 (b)(1)(A) and (5)(B), 1537); and that designations by the United States Government of critical habitats in foreign countries would be an internationally sensitive issue and would present serious practical difficulties. Gov't C.A. App. 10-15.

b. The initial position of FWS and NMFS that Section 7(a)(2)'s requirement that agencies ensure, after consultation, that their actions do not jeopardize the continued existence of a listed species *does* apply to activities in foreign countries aroused strong objections from the Departments of State and Defense, as well as other agencies that fund or carry out such activities. Those agencies expressed the view to FWS and NMFS that this interpretation was inconsistent with the presumption against extraterritorial application of an Act of Congress; that there was no basis in the text, legislative history or purposes of Section 7(a)(2) for concluding that Congress intended to treat actions that might jeopardize endangered or threatened species in foreign countries differently from actions that might affect the habitat of such species; and that the application of Section 7(a)(2) to activities abroad would be viewed by foreign governments as an unwarranted interference with matters within their jurisdictions. See Gov't C.A. App. 33-36, 43-52, 56-72.

In August 1979, the Solicitor of Interior ordered a reexamination of this question, and in 1981, the Associate Solicitor for Conservation and Wildlife rendered an opinion concluding that the Interior Department's earlier interpretation had been wrong. Gov't C.A. App. 53, 73-79. He reasoned that the 1978 amendments to the ESA, which allow exemptions from the rigid no-jeopardy standard in Section 7(a)(2) following a procedure that involves the "affected States" but make no mention of foreign governments (see 16 U.S.C. 1536(e)-(l)), show that Congress did not intend to reach activities in foreign countries. *Id.* at 75-77. The Associate Solicitor also reasoned that application of Section 7(a)(2)'s no-jeopardy and consultation requirements to activities in foreign countries would implicate "foreign sovereignty considerations," "cause significant delays in administering assistance activities in foreign countries," and "severely hamper the flexibility and responsiveness of American diplomacy abroad." *Id.* at 78.

FWS and NMFS published a proposed rule incorporating the reinterpretation in 1983, 48 Fed. Reg. 29,990, and a final rule in 1986, 51 Fed. Reg. 19,926. The new regulation states that the obligation under Section 7(a)(2) to consult with FWS or NMFS applies only to activities in the United States or upon the high seas. 50 C.F.R. 402.01 (1989). The preamble to the amended regulation explains that the change was necessary "because of the apparent domestic orientation of the consultation and exemption processes resulting from the [1978] Amendments, and because of the potential for interference with the sovereignty of foreign nations." 51 Fed. Reg. at 19,929. The preamble also notes that FWS and NMFS perform only an "advisory function under Section 7" and that "the Federal agency makes the ultimate decision as to whether its proposed action will satisfy the requirements of section 7(a)(2)." *Id.* at 19,928.

2. In October 1986, the respondent organizations filed this action against the Secretary of the Interior (but not the Secretary of Commerce), seeking a declaratory judgment that the Secretary's revised interpretation is erroneous and an injunction requiring the Secretary to issue a new regulation stating that Section 7(a)(2)'s consultation obligation applies to federal agency actions in foreign countries. On February 25, 1987, the district court granted the Secretary's motion to dismiss the complaint for lack of standing. App., *infra*, 55a-64a. The court first rejected respondents' effort to base their standing on their members' interest in the proper enforcement of the ESA as inconsistent with this Court's decisions holding that an asserted right to have the government act in accordance with the law is insufficient to satisfy Article III standing requirements. App., *infra*, 59a-60a (citing *Allen* v. *Wright*, 468 U.S. 737, 754 (1984), and *Valley Forge Christian College* v. *Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 483-484 (1982)).

Respondent Defenders of Wildlife (Defenders) did identify several U.S.-assisted projects in foreign countries that had been visited by several of its members and that had not been the subject of formal consultation with the Secretary of the Interior pursuant to Section 7(a)(2) of the ESA. The court held, however, that those projects—the Mahaweli Project in Sri Lanka (which involves construction of dams and irrigation works on the Mahaweli River and is assisted in part by the Agency for International Development (AID)) and the rehabilitation of the Aswan High Dam in Egypt (which is assisted by the Bureau of Reclamation)—did not "provide a sufficient basis for showing an actual or threatened injury traceable to the Secretary's reinterpretation of Section 7." App., *infra*, 62a.[1] The court pointed out that "the final

[1] The court of appeals rejected Defenders' reliance on the Picchis-Palcazu Project in Peru, which was once assisted by AID, because

decision of whether to proceed or continue with a project lies with the acting agency," yet respondents had "not sought to enjoin the agency action that they contend is allegedly causing them harm," but instead sought to "have the court construe the ESA in the abstract." *Id.* at 63a. If it determined that the Secretary's interpretation of Section 7(a)(2) is erroneous—and if the agencies concerned did not then voluntarily initiate consultation—"[respondents] would have to bring a second lawsuit to enjoin the agency action as it relates to those particular projects." *Id.* at 63a-64a. Thus, the court concluded, Defenders "failed to request a remedy that will redress the injury [it] is relying on to show standing." *Id.* at 63a.

3. a. A divided panel of the court of appeals reversed and remanded. App., *infra*, 33a-54a. The court of appeals first concluded that respondents had pleaded sufficient injury-in-fact to establish Article III standing. App., *infra*, 40a-44a. It believed that Defenders had adequately alleged that the specific projects visited by its members were increasing the rate of extinction of endangered species. *Id.* at 41a-42a. In addition, the court held that respondents had pleaded a "procedural harm" based on an asserted violation of "procedural rights" under the ESA—namely, respondents' asserted right, in light of their interest in the administration of the ESA, to have federal agencies consult with one another about possible injury to a listed species. *Id.* at 42a-44a.

The court of appeals also held that respondents satisfied the further Article III requirements of showing that the injury they allege "'fairly can be traced to the challenged action' and 'is likely to be redressed by a favorable decision.'" *Valley Forge*, 454 U.S. at 472 (quoting *Simon* v. *Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976)). See App., *infra*, 44a-50a. Although the Secretary pointed out that there was no

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a member of Defenders "came only within several hundred miles" of the project. App., *infra*, 9a n.2.

indication that the projects Defenders identified would actually affect endangered or threatened species, the court held that Defenders' standing did not depend on proof of such harm. Instead, the court held that Defenders could rely on the proposition, which it found "implicit" in Defenders' allegation of "procedural injury," that an agency's failure to consult with the Secretary would create a "risk" that it might overlook harm to endangered species. *Id.* at 46a.

Relying on *United States* v. *SCRAP*, 412 U.S. 669 (1973), the court rejected the Secretary's further contentions that causation and redressability are lacking here because (1) it is up to the agency concerned to decide whether to consult with the Secretary, and the interpretation of Section 7(a)(2) in the Secretary's regulation (or any court-ordered revision thereof) would not require any action agency to consult or to make any decision about a particular project, and (2) the final design of a foreign project in any event depends on the independent actions of the foreign government. App., *infra*, 47a-50a. In the court's view, "Congress itself ha[d] legislated the requisite causation and redressability" by determining that "consultation between the Secretary and the action agency" is the "remedy" for the alleged "harm" to the "personal, professional, and aesthetic interests" of Defenders' members. *Id.* at 49a, 50a. The court likewise held that Defenders was not required to seek injunctive relief against action by federal agencies whose projects in foreign countries allegedly would harm protected species, rather than against the Secretaries' interpretative regulation. Without elaboration, the court stated it was "satisfied" that an injunction requiring the Secretary to revise the regulations "would result in consultation, which in turn would foreclose the possibility that harm to endangered species will be overlooked." *Id.* at 50a.

b. Judge Bowman dissented from what he termed the majority's "slighty surrealistic" holding that respondents have standing. App., *infra*, 51a. He found the alleged

causal link between the new interpretative regulation and any harm to endangered species in foreign countries "far too speculative, attenuated, and remote to support standing," since the ESA does not give the Secretary of the Interior either "the power to order an action agency to comply with his requests or to veto its decision," or "any power to direct the actions or decisions of a foreign country." *Ibid.* For the same reason, Judge Bowman concluded that respondents did not satisfy the redressability requirement for standing, since even if the Secretary was required to revise the regulation, "the action agency and the host nation still would be legally entitled to exercise their independent judgment concerning proposed projects." *Id.* at 52a.

4. On remand, the Secretary moved for summary judgment on the question of standing, after taking the depositions of several members of the respondent organizations who had allegedly suffered injury. Respondents made no attempt to bolster the factual record on the standing issue; they simply moved for summary judgment on the merits. On February 15, 1989, the district court granted respondents' motion. App., *infra*, 21a-32a. Although the court acknowledged that respondents had to affirmatively prove their standing at the summary judgment stage, the court "fe[lt] that the Eighth Circuit ha[d] already determined the standing question in this case" when it reversed the district court's order granting the Secretary's motion to dismiss, and that "[t]he new 'proof' and arguments offered by the Secretary do not vary the situation enough to merit an analysis differing from that given by the Eighth Circuit." *Id.* at 24a-25a. On the merits, the district court disagreed with the interpretation in the joint regulations and held that the consultation requirement in Section 7(a)(2) applies to activities in foreign countries. *Id.* at 25a-30a. The court therefore ordered the Secretary to publish regulations "clearly recognizing the full mandate" of Section 7 as requiring each federal agency to consult with the Secre-

tary on projects that may affect endangered or threatened species, wherever found. *Id.* at 31a.

5. The court of appeals affirmed. App., *infra*, 1a-20a. In holding that Defenders has standing, the court cited affidavits of two of Defenders' members that, in its view, showed that they "had visited, and planned to visit again, the endangered species or their habitat in the areas that may be affected by" the Mahaweli Project in Sri Lanka and the Aswan High Dam in Egypt. *Id.* at 7a. The court further held that even if none of its members had a "geographical nexus" to foreign projects that might harm endangered or threatened species, Defenders had satisfied Article III standing requirements by demonstrating a "procedural injury" based on "the Secretary's failure to follow the required consultation procedure." *Id.* at 9a-10a. The court believed that the "ambitious purpose" of the ESA and the existence of its citizen-suit provision (16 U.S.C. 1540(g)) indicated that Congress "intended to bestow procedural rights upon environmental organizations such as Defenders." *Id.* at 10a-11a.

On the merits, the court of appeals agreed with the district court that Section 7(a)(2) should be construed to apply to activities in foreign countries. App., *infra*, 11a-20a. The court acknowledged that statutes are presumed to have domestic scope only and that this presumption may be overcome only by a "clear expression of congressional intent." *Id.* at 13a, 19a. And the court further recognized that in light of this presumption, the general phrasing of Section 7(a)(2), which requires each federal agency to ensure (after consultation) that "any" action it funds or carries out is not likely to jeopardize the existence of "any" listed species, is insufficient to render that requirement applicable to projects in foreign countries. *Id.* at 12a-13a. But despite this acknowledged inconclusiveness of the text of the relevant statutory section, the court of appeals ruled that it owed "no deference" to the Secretary's construction of that section under *Chevron U.S.A. Inc.* v. *NRDC, Inc.*, 467 U.S. 837, 842-843 (1984). App., *infra*, 15a.

The court instead believed that a congressional intent to apply Section 7(a)(2) to activities in foreign countries could be "gleaned" from *other* sections of the ESA (App., *infra*, 15a): the prefatory declaration that the United States had pledged itself in the international community to conserve various species and had entered into international agreements to that end (16 U.S.C. 1531(a)(4) and (5)); the provision for the Secretary to list species in a foreign country, taking into account the views and conservation efforts of its government (16 U.S.C. 1533(b)(1)(A), (1)(B) and (5)(B)); and Section 8 of the Act, entitled "International Cooperation," which authorizes assistance to foreign nations in conserving endangered and threatened species (16 U.S.C. 1537). *Id.* at 13a-15a. The court rejected the Secretary's contention that it is through Section 8 (as well as Section 9, 16 U.S.C. 1538, which prohibits importation of listed species), not extraterritorial application of the no-jeopardy standard and the ancillary consultation requirement in Section 7(a)(2), that Congress addressed the conservation of endangered or threatened species in foreign countries. The court also believed that when Congress amended the ESA in 1978, it gave "tacit approval" to the initial administrative interpretation that Section 7(a)(2) applies overseas. *Id.* at 17a.

In so ruling, the court did not dispute the Secretary's representation that such an interpretation of Section 7(a)(2) would have adverse consequences for the Nation's foreign relations, since it would be regarded "as an intrusion upon the sovereign right of foreign nations to strike their own balance between development of natural resources and protection of endangered species." App., *infra*, 20a. But the court concluded that although "Congress may decide that its concern for foreign relations outweighs its concern for foreign wildlife," the court would not make such a decision on Congress's behalf. *Ibid.*[2]

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[2] The Secretary's petition for rehearing, with suggestion of rehearing en banc, was denied on December 10, 1990, with two judges

REASONS FOR GRANTING THE PETITION

The decision of the court of appeals is extraordinary in several respects. It interprets the scope of Section 7(a)(2) of the Endangered Species Act in the context of an abstract dispute over advisory regulations promulgated by the Secretary of the Interior and Secretary of Commerce to assist other agencies, not in the context of an actual controversy over a specific agency action to which the obligations of Section 7(a)(2) assertedly attach. And it requires the Secretary to promulgate new regulations incorporating the court's expansive view of the law, even though respondents were unable to show that the existing regulations had actually affected any particular agency action or foreign project—and even though the court was powerless in any event to prevent whatever harm to endangered species might result from a project in a foreign country. The interpretation of Section 7(a)(2) by the courts below in this abstract setting is a classic example of an advisory opinion, which it is beyond the jurisdiction of an Article III court to render. *Muskrat* v. *United States*, 219 U.S. 346, 354, 361-362 (1911); Correspondence of the Justices, *reprinted in* 3 *The Correspondence and Public Papers of John Jay* 486-489 (H. Johnston ed. 1891).

The court of appeals' holding that respondents nevertheless have standing to challenge the interpretative regulations conflicts with repeated rulings by this Court that Article III requires a litigant to prove that he has suffered injury-in-fact that was caused by the challenged conduct of the defendant and that is likely to be redressed by the relief sought. In addition, the court of appeals' notion that respondents suffer a judicially cognizable "procedural injury" if an agency fails to consult with the Secretary about a particular foreign project, even if their members have no concrete geographical

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voting for rehearing en banc. App., *infra*, 65a. On January 7, 1991, the court of appeals stayed its mandate pending the filing and disposition of this certiorari petition.

nexus to the project site, finds no support in Section 7(a)(2), squarely conflicts with decisions of other courts of appeals, and invites wholesale circumvention of this Court's standing precedents by litigants having nothing more than a generalized interest in the conduct of the government.

The court of appeals' ruling on the merits—that the substantive no-jeopardy standard and the ancillary consultation requirement in Section 7(a)(2) apply to activities in foreign countries—is at odds with the text and legislative history of the Act, which show that Congress was concerned with domestic conditions in Section 7(a)(2) and separately addressed conservation of species in foreign countries through international cooperation, and with appellate decisions holding that other environmental statutes do not apply in foreign countries. The decision below also cannot be reconciled with the presumption that obligations imposed by Acts of Congress do not apply to activities in a foreign country, especially those undertaken by or with the approval of the foreign government concerned. Finally, the court of appeals plainly erred in giving no deference to what is, at the very least, a reasonable interpretation of Section 7(a)(2) by the Secretaries of Interior and Commerce and by the Executive Departments responsible for the conduct of the Nation's defense and foreign affairs.

Although rendered in a factual vacuum, the court of appeals' decision has significant consequences. It requires the Secretary of the Interior to issue new regulations announcing as his own an interpretation of the ESA with which he strongly disagrees. And it places all federal agencies in the unseemly position of either disregarding that formal, judicially ordered interpretation, or risking serious injury to the Nation's foreign relations and foreign-aid programs by attempting to impose the rigid no-jeopardy standard in Section 7(a)(2) on foreign governments and following consultation procedures that are not tailored to this special setting. Review by this Court therefore is warranted.

A. Article III of the Constitution "defines with respect to the Judicial Branch the idea of separation of powers on which the Federal Government is founded," as well as "the proper—and properly limited—role of the courts in a democratic society." *Allen* v. *Wright*, 468 U.S. 737, 750 (1984). The limitations imposed by Article III's requirement of a "Case[]" or "Controvers[y]" are distilled in the core doctrine of standing. Under that doctrine, a plaintiff first must establish a personal injury-in-fact. The injury cannot be "abstract," "hypothetical," or "conjectural," *O'Shea* v. *Littleton*, 414 U.S. 488, 494 (1974); *City of Los Angeles* v. *Lyons*, 461 U.S. 95, 101-102 (1983); it must be "distinct and palpable." *Whitmore* v. *Arkansas*, 110 S. Ct. 1717, 1723 (1990). Only a plaintiff who identifies a concrete injury-in-fact has "'such a personal stake in the outcome of the controversy' as to warrant *his* invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." *Warth* v. *Seldin*, 422 U.S. 490, 498-499 (1975). In addition, "the litigant must satisfy the 'causation' and 'redressability' prongs of the Art. III minima by showing that the injury 'fairly can be traced to the challenged action,' and 'is likely to be redressed by a favorable decision.'" *Whitmore* v. *Arkansas*, 110 S. Ct. at 1723 (quoting *Eastern Kentucky Welfare Rights*, 426 U.S. at 38, 41); see also *Allen* v. *Wright*, 468 U.S. at 751, 757-759.

Respondents satisfy none of these requirements: they have failed to prove any concrete injury, much less one that was caused by the Secretaries' interpretation of Section 7(a)(2) in their 1986 regulation or that would be redressed by a court-ordered revision of that interpretation. The court of appeals attempted to paper over this basic defect by focusing on two projects that it concluded "had not been subjected to the consultation requirement and would not be in the future if the new regulation remained in effect." App., *infra*, 7a. But this speculation about how projects not challenged in this liti-

gation might be affected by the Secretaries' interpretation cannot suffice to establish respondents' standing to bring the suit they did.

1. As an initial matter, even if those two projects were at issue in this case, Defenders would not have standing to challenge them. Joyce Kelly, a member of Defenders who visited Egypt in 1986, simply stated in her affidavit that she observed the habitat of the endangered Nile crocodile (although she did not claim actually to have seen any crocodiles), and that she intended to do so again (although she did not say when). Resp. C.A. App. 114. The court of appeals relied on Kelly's vague assertion (*ibid.*) that she would "suffer harm" as a result of the Aswan High Dam project. App., *infra*, 8a. But Defenders offered no proof that rehabilitating the Dam and repairing its generating works (see Resp. C.A. App. 82) would in fact be likely to jeopardize the continued existence of the Nile crocodile. *A fortiori*, Defenders did not prove that its members suffered harm that could fairly be traced to assistance rendered by the Bureau of Reclamation or to its failure to engage in formal consultation pursuant to Section 7(a)(2), and that any such harm would be remedied by consultation or the withdrawal of Bureau assistance.

Amy Skilbred, another member of Defenders, stated in her affidavit and deposition that she had traveled to Sri Lanka in 1981-1982 and visited, *inter alia*, the general area of the Mahaweli River project, although she did not see any evidence of the Project or know of its existence at the time and apparently did not observe any endangered or threatened species. Skilbred did state that she intended to go back to the Mahaweli Valley and hoped to see an endangered elephant and leopard (although she could not say when, especially in light of the civil war in Sri Lanka). Resp. C.A. Br. 169-171, 262-266, 269-270, 274. Moreover, although Skilbred asserted that the Mahaweli Project would seriously reduce the habitat of "endangered, threatened, and endemic species,"

she neither identified specific evidence that the Project would actually jeopardize the existence of any particular species nor tied her generalized assertions to discrete locations that she had visited or that are the sites of those portions of the Mahaweli Project receiving AID funds. Resp. C.A. App. 170-171, 265-266, 274. Nor did Skilbred or Defenders prove that any harm to endangered or threatened species that might result from the Project is fairly traceable to AID assistance (which amounted to only $170 million of an overall cost of $2.3 billion (Gov't C.A. App. 101)) or a failure by AID to engage in formal consultation with FWS under Section 7(a)(2), and that any such harm would be remedied by consultation or the termination of AID assistance. In fact, the record shows that even without the application of Section 7(a)(2), AID conducted an environmental assessment and actively assisted the Government of Sri Lanka in preventing harm to protected species in the Mahaweli Project area and conferred extensively (albeit informally) with FWS in doing so. App., *infra*, 47a; Gov't C.A. App. 28-32, 101.

In sum, Defenders did not show that past failures by action agencies to engage in formal consultation with FWS under Section 7(a)(2) had contributed to specific harm to its members' ability to view wildlife at the Aswan and Mahaweli Projects; and as to future harm, Defenders' two members simply expressed a general desire to return to those areas and a vague fear that an absence of consultation between the agencies concerned and FWS would cause harm. This showing would be wholly insufficient even if respondents had sought injunctive relief against the Bureau of Reclamation and AID requiring them to consult with FWS (or to withhold financial assistance from the Projects), since standing depends on injury that is "actual or imminent, not 'conjectural' or 'hypothetical.'" *Whitmore* v. *Arkansas*, 110 S. Ct. at 1723.[3]

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[3] If such a claim of "injury" were sufficient, the plaintiffs in *Lujan* v. *National Wildlife Fed'n*, 110 S. Ct. 3177 (1990), could have ac-

2. Defenders did not, however, even seek relief against the two projects on which it relied in an effort to establish injury to its members. It instead sought to require the Secretary to rescind a non-binding regulation interpreting Section 7(a)(2) and to issue new regulations giving that Section a broader interpretation. This feature of the case further attenuates the elements of causation and redressability. As the regulations make clear (see page 4, *supra*), action agencies are ultimately responsible for making their own determinations about what is required of them under Section 7(a)(2), see also *National Wildlife Fed'n* v. *Coleman*, 529 F.2d 359, 371 (5th Cir.), cert. denied, 429 U.S. 979 (1976); *Sierra Club* v. *Froehlke*, 534 F.2d 1289, 1303 (8th Cir. 1976); cf. *TVA* v. *Hill*, 437 U.S. 153, 186 n.31 (1978), and those agencies would remain free as a legal matter to decide whether they will follow Section 7(a)(2)'s standards and procedures in connection with projects in foreign countries even if the regulation were changed, just as they were before.

Thus, in Administrative Procedure Act terminology, respondents are not "adversely affected" by the particular "agency action" (the interpretative regulation) they challenge. 5 U.S.C. 702; *Lujan* v. *National Wildlife Fed'n*, 110 S. Ct. at 3185-3186. To the extent respondents ever could show injury in APA and Article III terms, it would result only when a federal agency actually took action. As this Court emphasized in *Lujan* v. *National Wildlife Fed'n*, "[u]nder the terms of the APA, respondent must direct its attack against some particular 'agency action' that causes it harm." 110 S. Ct. at 3190.[4]

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quired standing simply by stating that their members intended, someday in the future, to visit all the land at issue in that case.

[4] The Court also reaffirmed in *Lujan* v. *National Wildlife Fed'n* that where, as here, there is no special statute authorizing immediate judicial review of regulations, a challenge to a regulation ordinarily is not ripe "until the scope of the controversy has been

Furthermore, the critical decisions regarding projects such as those cited by the court of appeals are not made by the action agencies of the United States Government; they are made by the respective foreign governments. The Mahaweli Project, for instance, involves twelve donors besides AID, which is furnishing less than 10% of the expected cost. Gov't C.A. App. 101. There could be no assurance that the Government of Sri Lanka would redesign or stop the Project even if AID threatened to terminate funding due to endangered species concerns raised during consultations with FWS. In such situations, host countries may simply turn to other donors that do not place restrictions on their funds. Thus, the causal connection between the challenged interpretative regulation and the asserted injury to Defenders' members is "highly indirect," hinging as it does on the independent actions of two sets of third parties not before the court; and the prospect of redress is correspondingly speculative. *Whitmore* v. *Arkansas*, 110 S. Ct. at 1725; *Allen* v. *Wright*, 468 U.S. at 757; *Eastern Kentucky Welfare Rights*, 426 U.S. at 42; *Lujan* v. *National Wildlife Fed'n*, 110 S. Ct. at 3190 & n.3.[5]

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reduced to more manageable proportions, and its factual components fleshed out, by some concrete action applying the regulation to the claimant's situation in a fashion that harms or threatens to harm him." 110 S. Ct. at 3190. Here, respondents have not identified any concrete application of the interpretation reflected in the regulation that harms or threatens to harm them.

[5] Article III standing requirements must be enforced with particular scrupulosity in the present setting because of the potential for interference with the responsibilities of the political Branches for national defense and foreign relations. Respondents seek to affect the course of projects that are undertaken or approved by foreign sovereigns and that must be assumed by U.S. courts to be entirely proper under those sovereigns' own laws and international commitments. Moreover, respondents' claim of "injury" rests on alleged harm to wildlife that is wholly within the territorial and governmental jurisdiction of foreign sovereigns. In light of the intervening authority of the foreign sovereigns, it is especially clear that an asserted "injury" arising in such a wholly foreign context

3. The court of appeals tried to sidestep the lack of concrete injury by proclaiming that standing could rest on a "procedural injury" that allegedly arises from the failure by action agencies to engage in Section 7 consultation about overseas projects. App., *infra*, 10a-11a, 42a-44a. But there is no indication that the consultation provisions of Section 7 were intended to confer procedural rights on private groups such as respondents. Consultation takes place entirely between the relevant agencies, without any statutory provision for public input. See 16 U.S.C. 1536(b) and (c); 51 Fed. Reg. at 19,928. Section 7 therefore is unlike the National Environmental Policy Act of 1969 (NEPA), 42 U.S.C. 4321 *et seq.*, in which some courts have found a public information purpose. See, *e.g.*, *Trustees for Alaska* v. *Hodel*, 806 F.2d 1378 (9th Cir. 1986).

Moreover, even under a statute like NEPA, some concrete interest, distinct from a "procedural" claim, is essential for Article III standing, because procedural protections exist only to secure substantive interests and therefore may be invoked only by persons having such interests. Accordingly, the three circuits that have recognized "procedural injury" as a basis for standing in suits raising NEPA claims have limited that theory to a litigant "having a sufficient geographical nexus to the site of the challenged project that he may be expected to suffer whatever environmental consequences that the project may have." *City of Los Angeles* v. *NHTSA*, 912 F.2d 478, 492-493 (D.C. Cir. 1990) (quoting *City of Davis* v. *Coleman*, 521 F.2d 661, 671 (9th Cir. 1975)); see also *Friends of the Earth* v. *U.S. Navy*, 841 F.2d 927, 931-932 (9th Cir. 1988); *City of Evanston* v. *Regional Transp. Auth.*, 825 F.2d 1121, 1126 (7th Cir. 1987), cert. denied, 484 U.S. 1005 (1988); *South East Lake View* v. *HUD*, 685 F.2d 1027, 1039 (7th Cir. 1982). The Eighth Circuit's rejection of the "geograph-

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should not be a basis for invoking the jurisdiction of a U.S. court under U.S. law.

ical nexus" test (see App., *infra*, 10a-11a) squarely conflicts with these decisions.

Similarly, the court of appeals excused respondents' failure to show the causation and redressability required for standing by adopting respondents' view that Congress could simply "legislate[] the requisite causation and redressability" and had done so here by "determin[ing] that the remedy for the harm to the[] members' personal, professional, and aesthetic interest in endangered species is consultation between the Secretary and the action agency." App., *infra*, 49a-50a. There is no basis in the ESA for respondents' self-centered vision of Section 7(a)(2): that provision was designed to prevent harm to certain species of plants and animals, not to "remedy" injuries to the "interests" of human beings. In any event, the requirements of causation and redressability stem directly from Article III, *Whitmore* v. *Arkansas*, 110 S. Ct. at 1722-1723 & n.1; *Valley Forge*, 454 U.S. at 472, and hence cannot be waived by Congress. *Warth* v. *Seldin*, 422 U.S. at 501. The ESA citizen-suit provision, 16 U.S.C. 1540(g), upon which the court of appeals relied (App., *infra*, 10a), likewise cannot overcome standing deficiencies under Article III. See *Middlesex County Sewerage Auth.* v. *National Sea Clammers Ass'n*, 453 U.S. 1, 16 (1981) ("citizen suit provisions apply only to persons who can claim some sort of injury").[6]

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[6] In any event, the citizen-suit provision cannot be stretched to cover respondents' challenge in this case. That provision authorizes suits against any person "who is alleged to be in violation" of the ESA. 16 U.S.C. 1540(g)(1)(A). Section 7(a)(2) imposes the duties to consult and refrain from jeopardizing endangered or threatened species directly on the action agency. If the action agency fails to consult, it is that agency, not the Secretary, that has "violated" the ESA. Nor is the Secretary "in violation" of the ESA because he allegedly has given an incorrect interpretation to one of its provisions, especially since the ESA did not require the Secretary to interpret the geographic scope of Section 7(a)(2) in the first place. This suit instead is one challenging "agency action" (the regulation) under the APA.

4. The court of appeals' ruling is, at bottom, a holding that the Secretary's alleged misinterpretation of the ESA itself provides standing to challenge that interpretation by an organization having an historic interest in endangered species and the enforcement of the ESA. See App., *infra*, 10a, 43a. This result contravenes two bedrock Article III principles: "an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court," *Allen* v. *Wright*, 468 U.S. at 754, and an organization's longstanding interest in an environmental problem is not enough to confer standing, *Sierra Club* v. *Morton*, 405 U.S. 727 (1972). And as this case vividly illustrates, the court of appeals' novel standing theories open the way for broad suits by organizations that have no concrete stake in the conduct of governmental programs, contrary to *Lujan* v. *National Wildlife Fed'n.* For these reasons, and in light of the conflict with decisions of other courts of appeals on the "procedural injury" point, the Court should grant review on the standing question.

B. 1. The abstract nature of respondents' challenge may have led the court below to overlook the far-reaching consequences of its interpretation of Section 7(a)(2). The duty to consult under that Section, on which the court of appeals focused, is only an adjunct of an agency's substantive duty to ensure that its actions are not likely to jeopardize the existence of endangered or threatened species. If the duty to consult applies to activities in foreign countries, then so does the duty to avoid jeopardy. The latter is one of the strictest environmental standards imposed on federal agencies. See *TVA* v. *Hill*, 437 U.S. 153, 172-174 (1978).

Even the consultation obligation can impose substantial burdens that would be inconsistent with the need for speed, flexibility and comity in the conduct of the Nation's activities abroad. The action agency must first obtain from the FWS or NMFS information about listed

species that may be present and then prepare, within 180 days, a "biological assessment" if the project is a "major construction activity." 16 U.S.C. 1536(c); 50 C.F.R. 402.12(b)(1). If the activity may affect listed species, formal consultation, resulting in the issuance of a "biological opinion" by the FWS or NMFS, then occurs over a subsequent 90-day period. 16 U.S.C. 1536(b); 50 C.F.R. 402.14. The agency must refrain during consultation from making an irreversible commitment of resources that would foreclose reasonable alternatives. 16 U.S.C. 1536(d).[7] An Act of Congress should not lightly be construed to extend such rigid standards and formal procedures to activities abroad. Cf. *United States* v. *Verdugo-Urquidez*, 110 S. Ct. 1056, 1065-1066 (1990).

For reasons such as these, Congress is assumed to be "primarily concerned with domestic conditions," and an Act of Congress therefore will be read not to apply to activities abroad unless a contrary intent appears. See, *e.g.*, *Foley Bros.* v. *Filardo*, 336 U.S. 281, 285-286 (1949); *Argentine Republic* v. *Amerada Hess Shipping Co.*, 488 U.S. 428, 440-441 (1989). Other courts of appeals, in contrast to the decision below, have relied on that presumption in ruling against extraterritorial application of this Nation's environmental statutes. See *NRDC, Inc.* v. *NRC*, 647 F.2d 1345 (D.C. Cir. 1981) (holding NEPA inapplicable to export of nuclear reactor to Philippines); *United States* v. *Mitchell*, 553 F.2d 996, 1003-1004 (5th Cir. 1977) (holding Marine Mammal Protection Act of 1972, 16 U.S.C. 1361 *et seq.*, inapplicable

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[7] If FWS or NMFS makes a finding of jeopardy, the action agency must decide "whether and in what manner to proceed with the action in light of its Section 7 obligations and the Service's biological opinion." 50 C.F.R. 402.15(a). The agency may disagree with the biological opinion, implement an alternative recommended by FWS or NMFS to avoid jeopardy, or seek an exemption, which can itself be a time-consuming process. 16 U.S.C. 1536(g).

within territorial waters of Bahamas); see also *Greenpeace USA* v. *Stone*, 748 F. Supp. 749, 758-759 (D. Haw. 1990) (rejecting NEPA challenge to Secretary of Defense's implementation of agreement with Federal Republic of Germany to remove obsolete chemical weapons from Germany), appeal dismissed as moot, No. 90-16260 (9th Cir. Feb. 5, 1991).

The court of appeals discounted that presumption here because the ESA "is directed at the actions of federal agencies, and not at the actions of sovereign nations." App., *infra*, 20a. But as this Court recently held, the mere fact that United States law imposes limitations on conduct by the Government does not mean that the law follows the Government abroad. *Verdugo-Urquidez*, *supra*. Moreover, as other courts of appeals have pointed out, conditioning assistance to a foreign nation on the basis of our own environmental standards "directs that nation's choices just about as effectively as a law whose explicit purpose is to compel foreign behavior," and will likely be seen by that nation as a "disguised way of substituting United States regulatory standards for the [foreign nation's] own." *NRDC, Inc.* v. *NRC*, 647 F.2d at 1356-1357 (opinion of Wilkey, J.); accord *United States* v. *Mitchell*, 553 F.2d at 1002 (different countries strike different balances between development and preservation, and the "traditional method of resolving such differences * * * is through negotiation and agreement rather than through the imposition of one particular choice by a state imposing its law extraterritorially"). Indeed, Congress is also presumed not to legislate in a way that would risk interference with the Executive Branch's conduct of foreign affairs. *Weinberger* v. *Rossi*, 456 U.S. 25, 31-32 (1982); *McCulloch* v. *Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 19 (1963); *Benz* v. *Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 147 (1957); cf. *Zemel* v. *Rusk*, 381 U.S. 1, 17 (1965); *United States* v. *Curtiss-Wright Export Corp.*, 299 U.S. 304, 319-322 (1936).

2. There is no indication in the text or legislative history of the ESA that Congress intended to extend the duties imposed by Section 7(a)(2) to activities in foreign countries, much less the sort of clear expression of intent that would be needed to overcome these important considerations weighing against extraterritorial application here.[8]

a. As the text of Section 7(a)(2) makes clear, the purpose of consultation is to assist agencies in ensuring that their actions are not likely to "jeopardize the continued existence of any endangered or threatened species, or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical." The court of appeals recognized (App., *infra*, 12a-13a) that the use of such general phrases as "any action" and "any endangered species" in Section 7(a)(2) is insufficient in itself to extend its coverage to foreign countries, in light of the considerations weighing against extraterritorial application here. See *Foley Bros.*, 336 U.S. at 285 (statute requiring 8-hour day provision in "[e]very contract made to which the United States is a party" inapplicable to contracts for work performed in foreign country). Significantly, moreover, the only geographical reference in Section 7(a)(2) is the directive to the Secretary to consult with "affected States" before designating critical habitat. The lack of any requirement to consult with affected foreign nations is a strong indication that Congress was addressing domestic conditions. The court of appeals' response

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[8] Because application of Section 7(a)(2) would interfere with the activities of (and diplomatic dealings between) the United States Government and foreign governments—and because Congress separately addressed the conservation of species in foreign countries through other provisions of the ESA (see pages 25-27, *infra*)—this case is significantly different from *EEOC* v. *Arabian American Oil Co.*, No. 89-1838 (argued Jan. 16, 1991). There, we take the position that Title VII or the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, applies to discrimination by a U.S. employer against a U.S. national in a foreign country.

—that Congress intended extraterritorial application of Section 7(a)(2)'s protection for species but not its intimately related protection for their habitat (App., *infra*, 18a)—defies common sense.

The conclusion that Section 7 does not apply in foreign countries is confirmed by the exemption provisions in subsections (e)-(p), 16 U.S.C. 1536(e)-(p), added in 1978. Exemptions may be granted by an Endangered Species Committee consisting of the heads of six federal agencies and "one individual from each affected State." 16 U.S.C. 1536(e)(3). Similarly, the entities that may apply for an exemption are limited to the action agency, a permit or license applicant, and "the Governor of the State in which an agency action will occur, if any." 16 U.S.C. 1536(g)(1).[9] If Congress had contemplated that Section 7 would affect projects in foreign countries, it surely would have specified some role for a representative of the affected government, or at least the Secretary of State, in the process of granting exemptions from its rigid requirements. Moreover, to grant an exemption, the Committee must find that "the action is of regional or national significance," there are no "reasonable and prudent alternatives" to the action, the benefits of the action "clearly outweigh the benefits of alternative courses of action," and the action "is in the public interest." 16 U.S.C. 1536(h)(1)(A). Congress had domestic projects in mind when it devised these tests; indeed, it would be a significant intrusion upon the sovereignty of foreign nations to have the United States Government

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[9] Contrary to the court of appeals' speculation (App., *infra*, 19a), the phrase "if any" does not suggest that activities in foreign countries are covered. That phrase may simply assume coverage of activities on the high seas, in light of the responsibilities of the Secretary of Commerce for marine species. 16 U.S.C. 1532(15), 1536(e)(3)(F); 124 Cong. Rec. 21,563-21,564 (1978). Coverage of activities on the high seas does not present the same degree of foreign relations sensitivities that would arise from coverage of activities within the territories of foreign sovereigns.

unilaterally pass judgment on whether their projects are in the public interest and are preferable to alternatives.[10]

b. The court of appeals ultimately relied on *other* sections of the ESA in holding that Section 7(a)(2) applies to activities in foreign countries. App., *infra*, 13a-15a. But those provisions in fact confirm that Congress distinguished between the endangered species situation in the United States and that in foreign countries, and dealt with the latter by the accepted means of encouraging cooperative efforts between nations, rather than imposing this Nation's environmental standards abroad.

The congressional findings in paragraphs (1)-(3) of ESA Section 2(a) focus on species of fish, wildlife and plants "in the United States" that have been rendered extinct or depleted "as a consequence of economic growth and development untempered by adequate concern and conservation." 16 U.S.C. 1531(a)(1)-(3). There is no similar finding with regard to the effect of development in foreign nations, presumably because other nations may have different views about the proper balance between economic growth and environmental protection. Paragraph (4) of Section 2(a) notes that the United States "has pledged itself as a sovereign state in the international community to conserve to the extent prac-

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[10] Section 7(j) provides that the Committee "shall grant an exemption for any agency action if the Secretary of Defense finds that such exemption is necessary for reasons of national security." 16 U.S.C. 1536(j). To be meaningful in the foreign affairs area, a national security exemption would have to be invocable by the Secretary of State as well as by the Secretary of Defense. Furthermore, Section 7(j) apparently can only be invoked after the time-consuming consultation procedure has been completed and the Committee convened, 16 U.S.C. 1536(g), and no irreversible commitment of resources may be made during that time. 16 U.S.C. 1536(d). If Congress had intended Section 7 to apply in foreign countries, it presumably would have prescribed an exemption process tailored to the speed, flexibility, confidentiality, and comity that are necessary in the conduct of this Nation's foreign affairs.

ticable the various species of fish or wildlife and plants facing extinction," pursuant to treaties and international agreements. 16 U.S.C. 1531(a)(4). Thus, in the international sphere, Congress contemplated that measures would be taken cooperatively among "sovereign state[s]," each having jurisdiction within its own territory, and that, because of the different values and interests among nations, conservation would be accomplished only "to the extent practicable." 16 U.S.C. 1531(a)(4). Section 7(a)(2) is not tempered by such considerations of practicability and respect for national sovereignty.

Reflecting the approach envisaged by Section 2 of the ESA, Section 8, entitled "International cooperation," addresses conservation of species abroad by authorizing the President "to provide to any foreign country (with its consent) assistance in the development and management of programs * * * useful for the conservation of any endangered species or threatened species listed by the Secretary." 16 U.S.C. 1537(a). Section 8 further provides that the Secretary of the Interior, "through the Secretary of State," shall "encourage" foreign countries to conserve fish and wildlife and to enter into bilateral or multilateral agreements. 16 U.S.C. 1537(b). Congress also dealt with the protection of foreign species in Section 9 of the ESA, which makes it unlawful, *inter alia*, to "deliver, receive, carry, transport, or ship in interstate or foreign commerce" any endangered species. 16 U.S.C. 1538(a)(1)(E) and (a)(2)(C). But this substantive prohibition is carefully tailored to apply only to persons "subject to the jurisdiction of the United States," 16 U.S.C. 1538(a)(1) and (2), and the related prohibition on "takings" of endangered fish or wildlife is comparably limited to the United States, its territorial sea and the high seas. 16 U.S.C. 1538(a)(1)(B) & (C).

Because the ESA thus has both domestic and international components, it was necessary to provide for the listing of both domestic and foreign species. But in

doing so, Section 4, like Sections 8 and 9, is carefully tailored to accommodate the divergent interests and sensitivities of foreign nations by requiring the Secretary to take account of their efforts to protect species, 16 U.S.C. 1533(b)(1)(A), and to afford notice and an opportunity to comment to the foreign nation affected, 16 U.S.C. 1533(b)(5)(B). Section 7, by contrast, does not mention foreign nations and contains no provisions to consider and accommodate their interests and views. This reinforces the conclusion, already evident from references in Section 7(a)(2) itself to "affected States," that Congress did not intend *that* Section of the Act to have an extraterritorial reach.

c. The legislative history of Section 7 confirms its domestic orientation. References to Section 7 in the legislative history of the 1973 Act mention only domestic agency actions as being affected. See, *e.g.*, H.R. Rep. No. 412, 93d Cong., 1st Sess. 14 (1973) (Park Service actions in Yellowstone Park); 119 Cong. Rec. 42,913 (1973) (Air Force practice bombing in Texas); 119 Cong. Rec. 25,691-25,692 (1973) (Corps of Engineers road-building in Kentucky). By contrast, the goal of conserving foreign wildlife was discussed in terms of international cooperation, treaties, and restrictions on international trade in wildlife.[11]

The legislative history of the 1978 amendments is to the same effect. The Senate Report, for example, explained that the exemption procedure added by those amendments was "intended to provide a mechanism for the resolution of conflicts which might arise between the Endangered Species Act's mandate to protect and manage endangered and threatened species and other legitimate *national* goals and priorities such as providing

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[11] See S. Rep. No. 307, 93d Cong. 1st Sess. 5-6 (1973); H.R. Rep. No. 412, 93d Cong., 1st Sess. 6 (1973); 119 Cong. Rec. 25,670 (1973) (Sen. Tunney); *id.* at 25,693 (Sen. Domenici); *id.* at 25,676 (Sen. Williams); *id.* at 30,166 (Rep. Leggett); *id.* at 30,163 (Rep. Dingell).

energy, economic development and other benefits to the *American* people." S. Rep. No. 874, 95th Cong., 2d Sess. 2 (1978) (emphasis added). The floor debates on the exemption procedure likewise discuss the effect of Section 7 only in connection with projects in the United States.[12] Nothing in the legislative history remotely suggests an intent to extend Section 7 to activities overseas.[13]

d. Finally, the court of appeals plainly erred under *Chevron* by giving "no deference" to what is, at the very least, a reasonable administrative interpretation of Section 7(a)(2). App., *infra*, 15a; see 467 U.S. at 842-843. Even where, as here, an agency has changed its mind, "substantial deference is nonetheless appropriate if there appears to have been good reason for the change." *Robertson* v. *Methow Valley Citizens Council*, 490 U.S. 332, 355-356 (1989). Here, as in *Robertson*, the revision of the regulation came about "only after the prior regulation had been subjected to considerable criticism." *Id.* at 356. For one thing, the initial interpretation conflicted with the consistent administrative interpretation that the closely related critical-habitat provisions in the

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[12] See, *e.g.*, 124 Cong. Rec. 21,132 (1978) (Senator Culver); *id.* at 38,124 (Rep. Bowen); *id.* at 38,128 (Rep. Bevill); *id.* at 38,665 (Rep. Murphy).

[13] The court of appeals relied (App., *infra*, 16a-17a) on a statement in the Conference Report that the Senate version of the amendments, "by retaining existing law, was preferable [to the House version] since regulations governing section 7 are now familiar to most Federal agencies and have received substantial judicial interpretation." H.R. Conf. Rep. No. 1804, 95th Cong., 2d Sess. 18 (1978). From this, the court inferred a "tacit approval" by Congress of the provision in the 1978 regulations that interpreted Section 7 as applying to projects in foreign countries. See page 2, *supra*. However, here, as in *Demarest* v. *Manspeaker*, 111 S. Ct. 599, 603 (1991), "[t]here is no indication that Congress was aware of the administrative construction * * * at the time it revised the statute." See also *United States* v. *Rutherford*, 442 U.S. 544, 554 n.10 (1979); *TVA* v. *Hill*, 437 U.S. at 192. The Conference Committee was focusing on an issue of procedure, not substance.

same sentence of Section 7(a)(2) do *not* apply in foreign countries. Moreover, as the Interior Department explained, the 1978 amendments to the ESA highlighted the "domestic orientation of the consultation and exemption processes," while the comments of other Departments made manifest "the potential for interference with the sovereignty of foreign nations" that would result from extraterritorial application. See pages 3-4, *supra*. There was, in short, "good reason for the change." *Robertson*, 490 U.S. at 356.

Furthermore, the interpretation now embodied in the regulations of the Secretary of the Interior and the Secretary of Commerce has been consistently and firmly adhered to throughout by the Executive Departments that are responsible for conducting the activities of the United States Government abroad, and it now represents the uniform view of the two Secretaries and those Departments. The court of appeals has cast that considered view and broad consensus aside. And in this most awkward of lawsuits, in which no Executive official except the Secretary of the Interior is before the court and no project affected by the interpretation of Section 7(a)(2) is even at issue, the court of appeals has sought to force every Department of the Executive Branch to acquiesce in the court's far different view of Section 7(a)(2)'s geographic reach. In light of the serious dilemma the decision below presents for the Departments concerned, and the serious consequences that may ensue in the conduct of the Nation's foreign affairs, review by this Court is warranted.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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MARCH 1991

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 89-5192
No. 89-5386

DEFENDERS OF WILDLIFE, FRIENDS OF ANIMALS AND THEIR ENVIRONMENT; AND THE HUMANE SOCIETY OF THE UNITED STATES, APPELLEES

v.

MANUEL LUJAN, as Secretary of the Interior,
APPELLANT

Appeals from the United States District Court
for the District of Minnesota

Submitted: May 17, 1990

Filed: August 10, 1990

Before JOHN R. GIBSON, Circuit Judge, BRIGHT, Senior Circuit Judge, and FAGG, Circuit Judge.

JOHN R. GIBSON, Circuit Judge.

The court again considers a challenge to a regulation promulgated by the Secretary of the Interior, Manuel Lujan, Jr., under the Endangered Species

Act, 16 U.S.C. §§ 1531-1544 (1988), which provides that federal agencies funding projects in foreign countries have no duty to consult with the Secretary about their projects' impact on endangered species. We earlier reversed the dismissal of this action brought by Defenders of Wildlife, Friends of Animals and Their Environment, and the Humane Society (collectively Defenders), and upon remand, the district court [1] held that Defenders had standing to bring this action and granted summary judgment on the merits in their favor. On appeal, the Secretary argues that the court erred in holding both that Defenders had standing and that Congress intended for the Endangered Species Act to apply to projects in foreign countries. We affirm the order of the district court.

Congress declared in the Endangered Species Act that "the United States has pledged itself as a sovereign state in the international community to conserve to the extent practicable the various species of fish or wildlife and plants facing extinction." 16 U.S.C. § 1531(a)(4). Toward this purpose, the Act requires each federal agency to consult with the Secretary to "insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species." *Id.* § 1536(a)(2). After consultation, the Secretary must issue a written opinion to the agency describing how the proposed agency action would affect the endangered species or critical habitat. The Secretary must also suggest reasonable alternatives

[1] The Honorable Donald D. Alsop, Chief Judge for the United States District Court for the District of Minnesota.

if the agency action would jeopardize the existence of the species or habitat. *Id.* § 1536(b)(3)(A).

Defenders brought this action to challenge a new regulation promulgated by the Secretary which limits the consultation obligation to agency action "in the United States or upon the high seas." 50 C.F.R. § 402.01 (1986). The new regulation defines "action" as "all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas." *Id.* § 402.02. This new regulation replaced a regulation which required agencies to consult with the Secretary concerning actions in foreign countries. *See* 50 C.F.R. § 402.04 (1978).

The Secretary moved to dismiss for lack of subject-matter jurisdiction on the basis that Defenders lacked standing to bring the action. The district court granted the motion. 658 F. Supp. 43 (D. Minn. 1987). On appeal, this court reversed and remanded because we held that Defenders had standing to challenge the regulation. 851 F.2d 1035 (8th Cir. 1988). Upon remand, after further discovery on standing, including filing additional affidavits and deposing the affiants, the district court granted Defenders' motion for summary judgment on the issue of whether the Act requires agencies to consult with the Secretary on projects in foreign countries. 707 F. Supp. 1082 (D. Minn. 1989). The court found that both the Act's plain language and its legislative history supported the court's conclusion that the consultation duty extended to foreign projects. *Id.* at 1084-86. The court ordered the Secretary to revoke and rescind the portion of the regulation limiting the consultation duty to agency actions in the United States or upon the high seas, and to publish proposed regulations clearly

recognizing that the consultation duty applies to agency actions affecting endangered species wherever found. *Id.* at 1086. This appeal followed.

I.

The Secretary first argues that our earlier decision, which held that Defenders' allegations concerning standing were sufficient to withstand a motion to dismiss, did not relieve Defenders of the burden of proving standing at the summary judgment phase of the litigation. They argue that Defenders lacked standing because it could not show that the organization or its members were in fact injured by the new regulation. According to the Secretary, no member of Defenders actually used the area around any foreign projects being funded by the United States.

Our examination of the standing issue is guided by the following fundamental principle:

> [A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to [1] "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979), and [2] that the injury "fairly can be traced to the challenged action" and [3] "is likely to be redressed by a favorable decision," *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976).

Valley Forge Christian College v. Americans United for Separation of Church & State, 454 U.S. 464, 472 (1982). The standing requirement "tends to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating

society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Id.*

We address only the first requirement, injury in fact, because the Secretary does not contend that the traceability and redressability requirements are not met. In the earlier appeal to this court, we extensively discussed the standing issue and concluded that Defenders had sufficiently alleged injury in fact on two grounds. First, Defenders had alleged a substantive injury because the rate of extinction of endangered species was increasing in foreign countries which its members had visited to observe wildlife and which were the site of specific agency projects. 851 F.2d at 1040. Second, Defenders had alleged a procedural injury resulting from the Secretary's refusal to carry out statutorily-mandated procedures. *Id.* at 1040-41. Other courts of appeals have also recognized that failure to comply with required procedures may constitute injury in fact. *See, e.g., National Wildlife Fed'n v. Hodel*, 839 F.2d 694, 712 (D.C. Cir. 1988); *Munoz-Mendoza v. Pierce*, 711 F.2d 421, 428 (1st Cir. 1983); *South East Lake View Neighbors v. Department of Housing & Urban Dev.*, 685 F. d 1027, 1038-39 (7th Cir. 1982); *City of Davis v. Coleman*, 521 F.2d 661, 670-72 (9th Cir. 1975).

Upon remand to the district court, the Secretary again raised the standing issue, this time in its motion for summary judgment. The Secretary argued that Defenders bore a greater burden in proving standing at the summary judgment stage than it did when responding to the motion to dismiss, and insisted that Defenders had failed to carry this burden. The district court dealt with this argument as follows: "Although the court appreciates the distinction

urged by the Secretary, it feels that the Eighth Circuit has already determined the standing question in this case. The new 'proof' and arguments offered by the Secretary do not vary the situation enough to merit an analysis differing from that given by the Eighth Circuit." 707 F. Supp. at 1083-84. The district court expressly denied summary judgment to the Secretary on the standing issue and, in granting summary judgment in favor of Defenders on the merits, necessarily determined, as a matter of law, the threshold issue of standing in favor of Defenders. It is, of course, "within the court's power to grant summary judgment sua sponte against the moving party, lacking a cross-motion, where the party against whom the judgment is entered has had a full and fair opportunity to contest that there are no genuine issues of material fact to be tried and the party granted judgment is entitled to it as a matter of law." *Burlington N. R.R. v. Omaha Pub. Power Dist.*, 888 F.2d 1228, 1231 n.3 (8th Cir. 1989). We review this issue under the standard for summary judgment set forth in Rule 56 of the Federal Rules of Civil Procedure. Defenders had the burden of showing "that there is no genuine issue as to any material fact." Fed. R. Civ. P. 56(c). *See Lujan v. National Wildlife Fed'n*, 110 S. Ct. 3177, 3186 (1990).

The Secretary correctly states that a court's refusal to dismiss an action for lack of standing does not relieve the plaintiff of the burden of actually proving standing where a defendant contests the factual basis for standing. *See National Wildlife Fed'n*, 110 S.Ct. at 3189; *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 115 (1979); *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 45 n.25 (1976); *Munoz-Mendoza*, 711 F.2d at 425; *Glover River. Org. v. United States Dep't of the Interior*, 675 F.2d 251,

254 n.3 (10th Cir. 1982). We are satisfied, however, that Defenders had met its burden of proving standing at the summary judgment phase of the litigation. The district court did not merely reiterate our earlier analysis of the standing issue. It stated that it appreciated the distinction urged by the Secretary and recognized that "plaintiffs must prove their standing without the benefit of any inferences in their favor," 707 F. Supp. at 1083. In contrast, Defenders received the benefit of all favorable inferences when both this court and the court below considered the motion to dismiss. After remand, the court did not merely consider the bare allegations in the complaint but reexamined the evidence initially offered, the new evidence, and the record as a whole. The court concluded that the new evidence had not significantly changed the situation from that which we considered in the earlier appeal and thus, that Defenders had established standing.

Our own review of the record supports this conclusion. The affidavits of several Defenders' members established that they had visited, and planned to visit again, the endangered species or their habitat in the areas that may be affected by specific agency projects. In our earlier opinion, we noted that "[a]n interest in aesthetic, conservational, and recreational values will support standing when an organizational plaintiff alleges that its members use the area and will be adversely affected." 851 F.2d at 1040; *see also United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 686 (1973). In the prior appeal, we identified several foreign projects that had not been subjected to the consultation requirement and would not be in the future if the new regulation remained in effect. Amy Skilbred, a

member of Defenders, stated in her sworn affidavit that she had visited Sri Lanka in order to observe its wildlife and animal habitat, and that she intended to return in the future for the same purpose. She stated that she would be harmed by the Mahaweli project in Sri Lanka, funded by the federal Agency for International Development (AID), because of its impact on wildlife. (Appellees' App. I at 169-71). In her deposition testimony, she also described her wildlife viewing activities in Sri Lanka, stated that she had visited the Mahaweli project, and expressed her intent to return to that area to view wildlife. *Id.* at 262-66.

Joyce Kelly, president of Defenders, stated in her sworn affidavit that she had visited Egypt and that she would suffer harm because of the Bureau of Reclamation's Aswan High Dam project. She expressed the intent to return to the area in the future. *Id.* at 114.

The Secretary offered additional evidence on the standing issue to the district court at the time of the parties' cross-motions for summary judgment. The court found that the proffered evidence was insufficiently probative to merit a conclusion other than that Defenders had standing. We agree because, as the court below observed, any dispute over a fact must be both material and genuine in order to defeat summary judgment. *Anderson v. Liberty Lobby*, 477 U.S. 242, 248 (1986). We believe that the evidence raises no genuine issue of material fact concerning whether Defenders has suffered an injury in fact. We are aware of the Supreme Court's recent opinion in *Lujan v. National Wildlife Fed'n* and we believe that the evidence offered to support standing here meets the requirements of Rule 56, unlike that offered in *National Wildlife Fed'n*. Defenders has pro-

vided specific facts, as opposed to claiming use of unspecified portions of immense tracts of land upon which the governmental activity may or may not occur, as was the case in *National Wildlife Fed'n*. *See* 110 S.Ct. at 3187-89.[2]

Furthermore, Defenders has also satisfied the standing requirement by demonstrating a procedural injury based upon the Secretary's failure to follow the required consultation procedure. Defenders has set forth specific facts adequate to show procedural injury, has established that the benefits flowing from the procedures in issue are an objective of the stat-

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[2] In *National Wildlife Fed'n*, the Supreme Court held that the allegations in the Peterson affidavit claiming use of land "in the vicinity of South Pass-Green Mountain, Wyoming," were insufficient to defeat summary judgment on standing. 110 S.Ct. at 3187, 3189. This claim was not specific enough because only 4500 acres of the two million acre area were affected by the challenged action. *Id.* at 3187-88. The Erman affidavit was similarly deficient because it claimed use of land "in the vicinity" of the Grand Canyon, the Arizona Strip, and the Kaibab National Forest. *Id.* at 3187. Of the 5.5 million acres of the Arizona Strip, only one-third were actually affected by the challenged action. *Id.* at 3188.

In contrast, the evidence here specifically identified the land areas visited which were the sites of the challenged agency projects. Skilbred stated that she visited the Mahaweli Project site in Sri Lanka and later confirmed that she was at that site by examining the AID Environmental Assessment. (Appellees' App. I at 269-70). Kelly stated that she had observed the traditional habitat of the Nile crocodile at the Aswan High Dam project in Egypt. *Id.* at 114.

We believe that the testimony of J. Campbell Plowden in this case was insufficient, standing alone, to demonstrate standing for the same reason that the affidavits in *National Wildlife Fed'n* were insufficient. The evidence showed that Plowden came only within several hundred miles of the Picchis-Palcazu project in Peru. (Appellants' App. at 126).

ute, and has identified the agency action which is the source of its injuries, as required by *National Wildlife Fed'n*, *id.* at 3194. The Secretary argues, based upon *City of Davis v. Coleman*, 521 F.2d 661 (9th Cir. 1975), that Defenders must prove a "geographical nexus" to the project sites in order to establish a procedural injury. *Id.* at 671. We reject this contention. Subsequent to *City of Davis*, the Ninth Circuit has decided cases which indicate that the geographical nexus test is not determinative. "In determining whether a given statutory duty creates a correlative procedural right, we look to the statutory language, the statutory purpose, and the legislative history." *Fernandez v. Brock*, 840 F.2d 622, 630 (9th Cir. 1988); *see also Dellums v. Smith*, 797 F.2d 817, 821 (9th Cir. 1986). When we apply the Ninth Circuit's procedural injury analysis here, we are persuaded that the Act is a statute imposing statutory duties which create "correlative procedural rights in a given plaintiff, the invasion of which is sufficient to satisfy the requirement of injury in fact in article III. *Fernandez*, 840 F.2d at 630.

As we observed in our earlier opinion, the Act "provides that 'any person' may commence a suit to enjoin any person who is alleged to be in violation of the ESA. *See* 16 U.S.C. § 1540(g). Environmental associations are 'persons' and may bring suit in their own name." *Defenders*, 851 F.2d at 1039. The Act's ambitious purpose also supports a construction that Congress intended to bestow procedural rights upon environmental organizations such as Defenders. "The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, *whatever the cost*." *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 184 (1978) (em-

phasis added). The legislative history of the Act, which we will discuss in more detail when addressing the merits of the action before us, similarly supports this construction. "[T]he plain language of the Act, buttressed by its legislative history, shows clearly that Congress viewed the value of endangered species as 'incalculable.'" *Id.* at 187. The Supreme Court also declared that "[t]he pointed omission of the type of qualifying language previously included in endangered species legislation reveals a conscious decision by Congress to give endangered species priority over the 'primary missions' of federal agencies." *Id.* at 185.

In sum, we are satisfied that, based upon the Defenders' evidence of both substantive and procedural injury, it has established standing sufficiently to survice both a motion to dismiss and to prevail on summary judgment.

II.

Having dealt with the threshold issue of standing, we now turn to the Secretary's argument that the language and legislative history of the Act show that Congress did not intend for the consultation requirement to apply to projects funded by the United States in foreign countries. The parties disagree as to whether the Secretary's interpretation of the Act, as revealed through its promulgation of the regulation at issue here, is entitled to deference by this court. The Supreme Court has spoken definitively on this issue:

> When a court reviews an agency's construction of the statute which it administers, it is confronted with two questions. First, always, is the question whether Congress has directly spoken to the precise question at issue. If the intent of

> Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron U.S.A. v. Natural Resources Def. Council, 467 U.S. 837, 842-43 (1984) (footnotes omitted). Thus, we first examine the words of the Act itself in search of clearly expressed congressional intent.

The statute upon which the challenged regulation is based provides:

> Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species. . . .

16 U.S.C. § 1536(a)(2). It cannot be denied that Congress has chosen expansive language which admits to no exceptions. Reduced to its simplest form, the statute clearly states that *each* federal agency must consult with the Secretary regarding *any* action to insure that such action is not likely to jeopardize the existence of *any* endangered species. We recog-

nize, however, that the use of all-inclusive language in this particular section of the Act is not determinative of the issue. *See Foley Bros. v. Filardo*, 336 U.S. 281, 287-88 (1949); *United States v. Mitchell*, 553 F.2d 996, 1003-04 (5th Cir. 1977). We must search the Act further for clear expression of congressional intent.

The Supreme Court extensively discussed the Act's ambitious purpose in *Tennessee Valley Authority v. Hill*. "The plain intent of Congress in enacting this statute was to halt and reverse the trend toward species extinction, whatever the cost. This is reflected not only in the stated policies of the Act, *but in literally every section of the statute*." 437 U.S. at 184 (emphasis added). The Court described the Act as "the most comprehensive legislation for the preservation of endangered species ever enacted by any nation." *Id.* at 180.

In the Act, Congress declared that "the United States has pledged itself as a sovereign state in the international community to conserve to the extent practicable the various species of fish or wildlife and plants facing extinction." 16 U.S.C. § 1531(a)(4). The Act lists various international agreements which guide this pledge. *Id.* Congress also committed itself to meeting the international commitments of the United States to existing conservation programs. *Id.* § 1531(a)(5). The Act further declares one of its purposes is to take the appropriate steps to achieve the purposes of the international treaties and conventions just mentioned. *Id.* § 1531(b).

The Act defines "endangered species" broadly and without geographic limitations. *See id.* § 1532(6). Furthermore, the Act sets out a detailed procedure for determining whether a species is endangered. *Id.*

§ 1533. This section states that the Secretary shall determine whether a species is endangered or threatened after taking into account "those efforts, if any, being made by any State or foreign nation . . . to protect such species." *Id.* § 1533(b)(1)(A). The Secretary is instructed to give consideration to species which have been designated as requiring protection from unrestricted commerce by any foreign nation, or pursuant to any international agreement, and species identified as in danger of extinction by any State agency or by any agency of a foreign nation. *Id.* § 1533(b)(1)(B)(i), (ii). Moreover, the Secretary is required to give actual notice to and invite comment from each foreign nation in which species proposed for listing as endangered are found. *Id.* § 1533(b)(5)(B).

The Secretary is instructed to publish a list of all species found to be threatened. *Id.* § 1533(c). Defenders asserts, and the Secretary does not contest, that "[a]s of May 1989, of 1,046 species listed as endangered or threatened, 507 were species whose range is outside the United States. In addition, there are 71 listed species whose range includes both United States and foreign territory." (Appellee's Brief at 4). The listing process does not distinguish between domestic and foreign species.

The Act contains a section entitled "International Cooperation" which declares that the United States' commitment to worldwide protection of endangered species will be backed by financial assistance, personnel assignments, investigations, and by encouraging foreign nations to develop their own conservation programs. 16 U.S.C. § 1537. While the Secretary argues that this section and section 1538, dealing with imports and exports of wildlife, embody Congress' com-

plete response to the international problem of endangered species, we are persuaded that this provision cannot be so neatly excised from the larger statutory scheme. Rather, we believe that the Act, viewed as a whole, clearly demonstrates congressional commitment to worldwide conservation efforts. To limit the consultation duty in a manner which protects only domestic endangered species runs contrary to such a commitment.

Based upon the foreging examination of the Act as a whole, we are convinced that congressional intent can be gleaned from the plain language of the Act. Accordingly, we owe no deference to the Secretary's construction of the Act. *See Chevron*, 467 U.S. at 842-43. Furthermore, "[t]he judiciary is the final authority on issues of statutory construction and must reject administrative constructions which are contrary to clear congressional intent. *Id.* at 843 n.9.

We believe that the answer to the extraterritorial issue can be found in the plain words of the statute. Our examination of the statute's legislative history, however, also reinforces our conclusion.

The original Environmental Species Act was enacted in 1973. Soon thereafter, the Secretary initiated a rulemaking process in order to implement the Act. In regard to the consultation requirement at issue here, the Secretary solicited comments from various agencies. Several agencies, including the Army Corps of Engineers, the State Department, and the Defense Department, expressed opposition to extraterritorial application. (Appellants' App. at 44-45, 52). The Council on Environmental Quality, the Interior Department Solicitor's Office, and the General Counsel's Office of the National Oceanic and Atmospheric Administration, however, took the posi-

tion that the consultation duty extended to foreign countries. (Appellees' App. I at 53, Appellants' App. at 19, 21). After considering the extensive commentary, the Secretary concluded that Congress intended the duty to extend beyond the United States, and published a final rule on January 4, 1978, providing that:

> Section 7 . . . requires every Federal agency to insure that its activities or programs in the United States, upon the high seas, and *in foreign countries*, will not jeopardize the continued existence of a listed species.

42 Fed. Reg. at 4871 (1978) (emphasis added). At that time, the Secretary justified the extraterritorial application by stressing the Act's broad, inclusive language; its legislative history; and its policy implications. *See* Appellants' App. at 21-25.

After these regulations were issued, Congress amended the consultation section of the Act to reflect its present version. The amendment was essentially a reorganization to allow additions to the rest of the section. The conference report to these 1978 amendments indicates that no substantive changes were intended:

> The conferees adopted Senate language creating a new section 7(a), which essentially restates section 7 of existing law, and outlines the responsibilities of the Secretary and other Federal agencies for protecting endangered species. . . . The Conferees felt that the Senate provision *by retaining existing law*, was preferable since regulations governing section 7 are now familiar to most Federal agencies and have received substantial judicial interpretation.

H.R. Rep. No. 1804, 95th Cong., 2d Sess. 18 (1978), *reprinted in* 1978 U.S. Code Cong. & Admin. News 9453, 9486 (emphasis added); *see also Sierra Club v. Clark*, 755 F.2d 608, 615 (8th Cir. 1985) (stating that the Conference Report is an authoritative source of congressional intent). In light of the fact that the "existing law" at the time of the 1978 amendments included the prior regulation requiring consultation on foreign projects, we believe that the above language provides strong evidence of the conference committee's tacit approval of the prior regulation. The Secretary relies upon *Securities & Exchange Commission v. Sloan*, 436 U.S. 103 (1978), for the proposition that we should be "extremely hesitant to presume general congressional awareness" of agency practices, based upon "a few isolated statements in the thousands of pages of legislative documents." *Id.* at 121. In light of the extensive commentary made by numerous agencies on the issue, however, we believe that it is highly unlikely that Congress was unaware of this state of the law.

Despite this evidence of congressional intent, in 1983, the Secretary issued a notice of proposed rulemaking to revise the regulation. The proposed regulation eliminated the need for consultation on foreign projects and defined "action" to exclude foreign activities. The Secretary attributed its radical shift on extraterritorial application to "the apparent domestic orientation of the consultation and exemption processes resulting from the [1978] Amendments, and because of the potential for interference with the sovereignty of foreign nations." (Appellants' App. at 84).

We are compelled to reject this justification. We recognize that "[a]n administrative agency is not disqualified from changing its mind," *NLRB v. Local*

Union No. 103, Int'l Ass'n of Iron Workers, 434 U.S. 335, 351 (1978), and that "substantial deference is nonetheless appropriate if there appears to have been good reason for the change," *Robertson v. Methow Valley Citizens Council*, 109 S. Ct. 1835, 1848 (1989). In this situation, however, the reasons offered for the change fall far short when examined in the context of the Act's language and legislative history previously discussed.

The Secretary places great emphasis upon the Act's treatment of the critical habitat clause, 16 U.S.C. § 1536(a)(2), as support for its position. According to the Secretary, Congress could not have intended that the critical habitat provisions apply only to domestic projects while the consultation requirement extends to foreign projects. We are not persuaded. The Act reveals an intent to separately address the concerns raised by critical habitats and endangered species. The designation of critical habitat is governed by different procedures and standards than the listing of endangered species. *See id.* § 1533(b)(2). Furthermore, we observe that the Secretary was not troubled by this alleged inconsistency when it promulgated its earlier regulation permitting differing geographic scopes of the two concerns. The evidence reveals that the consultation requirement and the critical habitat designation have been viewed as severable as to their geographical scope. *See* Appellants' App. at 18.

The Secretary claims that the domestic orientation of the consultation requirement is shown by the exemption provision, 16 U.S.C. § 1536(e)-(p), added by the 1978 amendments. Specifically, the Secretary points out that exemptions are granted only if "the action is of regional or national significance," *id.* § 1536(h)(1)(A)(iii), and require the weighing of

public interests, *id.* § 1536(h)(1)(A)(ii), which would be a gross intrusion upon the sovereignty of foreign nations. Again, we are unpersuaded. The exemption clauses provide that "the Governor of the State in which an agency action will occur, *if any*, . . . may apply to the Secretary for an exemption." *Id.* § 1536(g)(1); *see also* (g)(2)(B)(1)(i) (emphasis added). This language, when considered with the substantive and persuasive evidence previously discussed, leads us to conclude that the exemption provisions do not limit the consultation requirement geographically. The Secretary also identifies other provisions of the Act which purportedly limit the consultation duty. We have carefully considered these arguments and believe that they do not compel a different result here. They merit no further discussion.

To support its construction of the Act, the Secretary relies heavily upon the canon of statutory construction that statutes are presumed to have domestic scope only. *See Foley Bros.*, 336 U.S. at 285. To overcome the presumption that the statute was not intended to have extraterritorial application, there must be clear expression of such congressional intent. *United States v. Mitchell*, 553 F.2d at 1003. We are convinced that evidence of such intent is found both in the words of the Act and in its legislative history as previously set forth. This evidence leaves us with the belief that Congress intended for the consultation obligation to extend to all agency actions affecting endangered species, whether within the United States or abroad.

The Secretary also expresses concerns about the impact on foreign relations stemming from extraterritorial application of the consultation duty. It urges

that such a construction would be viewed as an intrusion upon the sovereign right of foreign nations to strike their own balance between development of natural resources and protection of endangered species. We note initially that the Act is directed at the actions of federal agencies, and not at the actions of sovereign nations. Congress may decide that its concern for foreign relations outweighs its concern for foreign wildlife; we, however, will not make such a decision on its behalf.

III.

The Secretary argues that we should also reverse the district court's award of attorney fees to Defenders if we reverse the court's holding on standing or the merits. The district court was authorized to award attorney fees pursuant to 16 U.S.C. § 1540 (g)(4). As we affirm the court's decision in all respects, we need not consider the Secretary's argument on the award of attorney fees.

IV.

In conclusion, we affirm the district court's holding that Defenders had standing to challenge this regulation as contrary to congressional intent. We also affirm the court's holding that Congress intended that the Act's consultation requirement apply to projects in foreign nations, as well as to projects in the United States and upon the high seas. Accordingly, we also affirm the court's award of attorney fees to Defenders.

A true copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX B

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

3-86-CV 757

DEFENDERS OF THE WILDLIFE,
FRIENDS OF ANIMALS AND THEIR ENVIRONMENT,
and THE HUMANE SOCIETY OF THE UNITED STATES,
PLAINTIFFS

v.

DONALD P. HODEL, as Secretary of the Interior,
DEFENDANTS

ORDER

[Filed Feb. 15, 1989]

I. BACKGROUND

Plaintiffs ("Defenders") filed this action on August 27, 1986. The complaint challenged the defendant's issuance of Regulations in 1986 which limited the "consultation provision"[1] of the Endangered Species Act[2] ("ESA") to those actions occurring in the United States or on the high seas. Previously, 50 C.F.R. § 402.02 had stated that consultation was required for any agency action, foreign or domestic. On February 25, 1987, this court dismisesd Defenders' action on the grounds that it had no subject matter jurisdiction because the plaintiffs lacked standing. The Eighth Circuit Court of Appeals reversed that order on July 8, 1988. The Secretary petitioned the Eighth Circuit for a rehearing and rehearing *en banc*, which petition was denied, and the case has been remanded to this court for further proceedings.

The parties come before the court now on cross motions for summary judgment. The court is asked to make two decisions at the present time. First, the Secretary asks the court to reexamine the issue of plaintiffs' standing. He argues that the standing determination reached by the Eighth Circuit was made in the context of a motion to dismiss, where all factual allegations were construed in a light favorable to plaintiffs. Now, a "new level" of litigation has been reached. The present motion is in the context of summary judgment. At this stage, the plaintiffs must prove their standing without the benefit of any inferences in their favor. The Secretary argues that the depositions taken of the plaintiffs prove that no

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[1] 16 U.S.C. § 1536(a)(2).

[2] 16 U.S.C. §§ 1531-1543 (1982).

member of the plaintiff groups will be injured by the new regulations, therefore, they have no standing. Plaintiffs, on the other hand, argue that they do have standing and that the opinion of the Eighth Circuit confirms that fact.

The second issue for determination is whether the 1986 regulations are invalid because they contradict the Endangered Species Act.[3] The 1986 regulations define an agency "action" so that federal agency action in foreign countries is no longer subject to the consultation requirements found in section 1536. Defenders argues that the ESA is clear in that the consultation requirements found at section 1536 apply to federal agency action throughout the world. Consequently, any regulations which stray from the statute's mandate are invalid.

II. STANDARD FOR SUMMARY JUDGMENT

The Supreme Court has stated that summary judgment is a tool to isolate and dispose of claims or defenses which are either factually unsupported or which are based on undisputed facts. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-324 (1986); *Hegg v. United States*, 817 F.2d 1328, 1331 (8th Cir. 1987). Summary judgment is proper, however, only if examination of the evidence in a light most favorable to the non-moving party reveals no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986).

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[3] Plaintiffs have also moved for summary judgment on the grounds that the Secretary's decision was arbitrary and capricious. That issue will not be discussed due to the disposition of plaintiffs' first cause of action.

The test for whether there is a genuine issue over a material fact is two-fold. First, the materiality of a fact is determined from the substantive law governing the claim. Only disputes over facts that might affect the outcome of the suit are relevant on summary judgment. *Liberty Lobby*, 477 U.S. at 252; *St. Amant v. Benoit*, 806 F.2d 1294, 1297 (5th Cir. 1987). Second, any dispute over material fact must be "genuine." A dispute is genuine if the evidence is such that it could cause a reasonable jury to return a verdict for either party. *Liberty Lobby*, 477 U.S. at 252. It is the non-moving party's burden to demonstrate that there is evidence to support each essential element of his claim. *Celotex*, 477 U.S. at 324.

Any discovery in this case pertaining to the present motions has been completed. Defenders' motion is a question of statutory interpretation and a matter of law for the court to decide. As to the facts regarding standing, although the parties have different interpretations regarding the facts, there is no dispute as to what those facts are. Summary judgment is, therefore, appropriate at this time.

III. STANDING MOTION.

As stated above, the Secretary argues that at this stage of the proceedings the plaintiffs bear a greater burden in providing standing than they did in the motion to dismiss, and have failed to carry that burden. Although the court appreciates the distinction urged by the Secretary, it feels that the Eighth Circuit has already determined the standing question in this case. The new "proof" and arguments offered by the Secretary do not vary the situation enough to merit an analysis differing from that given by the

Eighth Circuit. The court will, therefore, deny the Secretary's motion for summary judgment.

IV. ENDANGERED SPECIES ACT DISCUSSION

The consultation provision states that:

> Each federal agency shall, in consultation with and with the assistance of the Secretary, ensure that any action authorized, funded, or carried out by such agency . . . is not likely to jeopardize the continued existence of any endangered species or threatened species . . .

16 U.S.C. § 1536(a)(2) (1982).

The Secretary argues that the 1986 regulations are perfectly consistent with this language. He also argues that the 1986 definition of "action" is supported by the presumption against the extraterritorial application of United States statutes,[4] congressional and agency comments regarding the proper scope of the provision, and the fact that other statutes and other sections of the ESA more specifically deal with the international endangered species problem.

The Secretary's strongest argument is that statutes are presumed to have domestic scope only. This presumption of domestic application finds expression most clearly in an environmental case in *United*

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[4] The court assumes that the consultation provision can be classified as a statute with extraterritorial reach. Defenders has argued that it is merely a statute involving United States agencies spending United States money. *Plaintiffs' Reply Memorandum* at 3, n. 4. Because this difference in terminology does not control the outcome, the court expresses no opinion in regard to the technical "categorization" of the statute.

States v. Mitchell, 553 F.2d 996 (5th Cir. 1977). That case stands for the proposition that if environmental legislation is to be applied outside the boundaries of the United States, Congress' intent that the legislation be applied to that extent must be clearly expressed. One of the teachings of *Mitchell* is that the use of all-inclusive language, by itself, is not enough to provide that specific and clear direction. *Id.* at 1003.

The starting point for any question of statutory interpretation must be the words of the statute itself. If the language of the statute is plain and clear, that language is ordinarily regarded as conclusive. *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 570 (1982); *Sierra Club v. Clark*, 755 F.2d 608, 613 (8th Cir. 1985). The other methods of statutory interpretation come into play only if the statute itself is ambiguous. They are not used to cast doubt on the meaning of a statute which is clear on its face.[5]

The court finds that the ESA plainly states that federal agencies are required to consult with the Secretary regarding projects in foreign countries. Congress' clear intent that this is so can, for the most

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[5] Both parties have cited comments in support of their position uttered by various committees or agencies from periods before and after the ESA was passed. The court tends to the view that "[t]he fact of the matter is that legislative history can be cited to support almost any proposition, and frequently is." *Wallace v. Christensen*, 802 F.2d 1539, 1559 (9th Cir. 1986) (Kozinski, J., concurring). For the most part, the statements cited by the parties prove only that there was a difference of opinion among the various government branches and agencies. The court is of the impression that such comments reflect individual opinion and agency infighting more than anything else, and accords very little weight to such comments cited by either side.

part, be determined without resort to legislative history. Section 1536 clearly states that each federal agency must consult with the Secretary regarding any action which could jeopardize any endangered or threatened species. The language and mandate is all inclusive; it could not be more broad. Consultation must occur whenever an action endangers *any endangered species*. Endangered species exist outside the boundaries of the United States and high seas,[6] therefore, consultation must occur if an action in a foreign land affects an endangered or threatened species there.[7]

The court has made this determination well aware of the *Mitchell* holding that congressional intent to apply a statute extraterritorially must go beyond the use of inclusive language. The court finds that additional intent in several places. First, Congress' concern with the international aspects of the endangered species problem is unmistakable and appears repeat-

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[6] Although the court has not counted numbers, Defenders stated that 493 of the 883 species listed as endangered in 1986 had their primary range outside the United States.

[7] By coming to this conclusion, the court expresses no views as to the "best" or most diplomatic way of dealing with the preservation of endangered species in other countries, or how international relations regarding this issue should be structured. There are no doubt several ways these objectives could be realized, as evidenced by the beliefs of the Secretary and other individuals that the 1986 regulations best balance all concerns presented by this probelm. However, in section 1536, Congress has declared one way all federal agencies must respond to the problem. That congressional mandate cannot be subverted by the Secretary's redefinition of what "action" means. Congress required that consultation be given regarding actions in foreign countries. If that requirement is to be changed, it must be changed by Congress, not the Secretary.

edly throughout the statute. Section 1531 states that the United States has pledged itself to conserve, to the extent practicable, wildlife throughout the world. Section 1532(6) defines "endangered species" without regard to their presence in the United States. Section 1537 specifically deals with "international cooperation" regarding endangered species, and section 1538 (a) prohibits various actions, wherever occurring, by anyone subject to the jurisdiction of the United States. Section 1538 also shows that Congress knew that not *all* portions of the ESA were to apply worldwide. Where they did not want the prohibitions to have effect outside the United States, inclusive language was not used. Section 1536's all-inclusive language, when contrasted with the discriminatory language of section 1538, cannot be considered sloppiness on the part of Congress, but, rather, intentional language expressing a concern that the consultation provisions be given effect wherever agency action took place.

In addition to this "general" international concerns of the statute noted above, section 1533 requires the Secretary to list all species that are determined to be endangered or threatened. That section clearly states that the actions of *foreign nations* are to be considered in determining which species to list, and many species not native to or present in the United States appear on the list. *See* 50 C.F.R. Part 17. This broad definition of "endangered species," combined with the general international concern of the entire ESA, must be considered in interpreting the consultation requirements of section 1536.

Finally, the court finds Congressional intent to apply the statute extraterritorially in the interplay between the statute and federal regulations which

occurred during the 1978 amendments to section 1536. This interplay is the one piece of legislative history helpful to the resolution of the present controversy.

To gain perspective on the 1978 amendment, it is necessary to step back. The original ESA was passed in 1973. As a response to this, the Secretary of the Interior initiated a rule-making process to fully implement the Act. The consultation provision of section 7 (section 1536) was subject to considerable discussion and the Secretary published final rules for this provision on January 4, 1978. The final rules stated that section 7 required every federal agency to ensure that its actions *in foreign countries*, as well as in the United States, did not jeopardize the continued existence of any endangered species. 50 C.F.R. § 402.02, 43 Fed. Reg. 870, 874 (1978). After these regulations were issued, Congress amended section 1536. The new statutory language is the present version of section 1536 and was basically a reorganization which allowed additions to the rest of the section. The conference report on the 1978 amendments explained the new version of section 7(a) as follows:

> The conferees adopted Senate language creating a new section 7(a) which essentially restates section 7 of existing law, and outlines the responsibilities of the Secretary and other Federal agencies for protecting endangered species. . . . The conferees felt that the Senate provision by retaining existing law was preferable, since regulations governing section 7 are now familiar to most Federal agencies and have received substantial judicial interpretation.

H.R. Rep. No. 1804, 95th Cong., 2d Sess. 18 (1978).

This language constitutes the conference committee's "stamp of approval" of existing law and regulations governing section 7. As noted above, the regulations published ten months earlier requiring consultation for agency actions in foreign countries were part of that existing law.

The government argues that the language of the report and the "familiarity" with regulations it refers to relate to the case of *T.V.A. v. Hill*, 437 U.S. 153 (1978), and the activity regarding the snail darter controversay. While the hearings did focus on that topic, one cannot ignore the three-year process of interpreting the scope of the consultation provision and final rules issued in January, 1978. These regulations were part of the "existing law" and "regulations governing section 7" so as to be included in the retention of existing law.

The conference committee's "stamp of approval" of the worldwide scope of section 7, in addition to the all-inclusive language of the statute and the international concerns expressed throughout the ESA, leaves the court with the belief that the intent of Congress is clear. Congress intended that section 1536's consultation requirements were to apply to all actions, including those in foreign countries.

It follows from this finding that the 1986 regulations promulgated by the Secretary of Interior which limited the application of the ESA to those activities occurring within the United States or on the high seas are contrary to the ESA. Summary judgment will be granted in favor of Defenders on that basis.

Accordingly,

IT IS ORDERED That:

1. Defendant's motion for summary judgment is DENIED:

2. Plaintiff's motion for summary judgment is GRANTED; and

3. The Clerk shall enter judgment as follows:

IT IS ORDERED, ADJUDGED AND DECREED That the Secretary of Interior shall:

1. Revoke and rescind so much of 50 C.F.R. Part 402 (1987) as limits the consultation requirement of section 7 of the Endangered Species Act, 16 U.S.C. § 1536, to federal agency action that may affect endangered or threatened species in the United States or on the high seas;

2. Publish, within thirty (30) days of the lifting of any stay of execution of this judgment, proposed regulations clearly recognizing the full mandate of section 7 of the Endangered Species Act, expressly and affirmatively requiring that each federal agency consult with the defendant Secretary with respect to any agency action that may affect any endangered or threatened species, wherever found;

3. Publish, within sixty (60) days of the lifting of any stay of execution of this judgment, final regulations clearly recognizing the full mandate of section 7 of the Endangered Species Act, expressly and affirmatively requiring that each federal agency consult with the defendant Secretary with respect to any agency action that may affect any endangered or threatened species, wherever found.

4. Execution of this judgment shall be stayed for sixty (60) days or during the course of any appeal.

DATED: February 15, 1989.

/s/ Donald D. Alsop
DONALD D. ALSOP
Chief U.S. District Judge

APPENDIX C

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 87-5132

DEFENDERS OF WILDLIFE, FRIENDS OF ANIMALS AND THEIR ENVIRONMENT, AND THE HUMANE SOCIETY OF THE UNITED STATES, APPELLANTS

v.

DONALD P. HODEL, as Secretary of the Interior, APPELLEE

Appeal from the United States District Court for the District of Minnesota

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Submitted: December 15, 1987

Filed: July 8, 1988

Before John R. GIBSON, BOWMAN, and WOLLMAN, Circuit Judges.

WOLLMAN, Circuit Judge.

Defenders of Wildlife, Friends of Animals and Their Environment, and the Human Society of the United States (collectively Defenders) brought this action to challenge a Department of Interior final regulation that provides that United States agencies funding projects in foreign countries have no duty to

consult with the Secretary about the projects' impact on endangered species of wildlife or plants. Defenders alleged that the regulation violates the section 7 consultation requirement of the Endangered Species Act, 16 U.S.C. §§ 1531 et seq. (1982). The district court dismissed the action for lack of subject matter jurisdiction, concluding that Defenders failed to satisfy the standing requirement of Article III, Section 2 of the Constitution. We reverse and remand.

I.

In the Endangered Species Act (the Act or ESA), Congress declared that "the United States has pledged itself as a sovereign state in the international community to conserve to the extent practicable the various species of fish or wildlife and plants facing extinction." 16 U.S.C. § 1531(a)(4) (1982). The Secretary must publish in the Federal Register a list of species of wildlife or plants endangered or threatened with extinction. *Id.* § 1533(c)(1). *See also* 50 C.F.R. § 17.11-12 (1986). More than half of the species listed as endangered or threatened are species whose primary ranges are outside of the United States.

Under section 7(a) of the Act, 16 U.S.C. § 1536 (a)(2), a federal agency that authorizes, funds, or carries out any action must consult with the Secretary to insure that the action is "not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of [critical] habitat of such species." *Id.* Federal agencies thus have a mandatory duty to insure that their actions will not harm endangered species. *See* H. Rep. No. 412, 93d Cong., 1st Sess. (1973). The legislative history of the Act "indicates beyond doubt that Congress intended en-

dangered species to be afforded the highest of priorities." *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 174 (1978) (enjoining completion of multimillion-dollar dam to protect snail darter from extinction).

To assist federal agencies in meeting this responsibility, section 7 outlines a process through which agencies are to consult with the Office of Endangered Species of the United States Fish and Wildlife Service or the Office of Protected Species of the National Marine Fisheries Service. The purpose of the consultation process is to supply advice and information identifying actions that may harm listed species or their habitats. The Secretary must issue a written opinion describing the effect of the proposed agency action on endangered species. If the proposed action will harm endangered species, the Secretary must propose acceptable alternative action. *See* 16 U.S.C. § 1536(b). After consultation, "the final decision of whether or not to proceed with the action lies with the agency itself. Section 7 does not give the Department of the Interior a veto over the actions of other federal agencies, provided that the required consultation has occurred." *National Wildlife Fed'n v. Coleman*, 529 F.2d 359, 371 (5th Cir.), *cert. denied*, 429 U.S. 979 (1976); *see also Sierra Club v. Froehlke*, 534 F.2d 1289, 1303 (1976).

The present controversy stems from a final rule, published on June 3, 1986, that limits the scope of consultation. The regulation provides that federal agencies have a duty to consult with the Secretary to insure that any action they authorize, fund, or carry out only "in the United States or upon the high seas" it not likely to jeopardize the continued existence of any listed species. 50 C.F.R. § 402.01 (1986). Previously, consultation on federal agency

actions in foreign countries was required. *See* 50 C.F.R. § 402.04, 43 Fed. Reg. at 874 (1978). Additionally, the new rule defines an "action" as "all activities or programs of any kind authorized, funded, or carried out, in whole or in part by Federal agencies in the United States or upon the high seas." 50 C.F.R. § 402.02 (1986). The Secretary's list of endangered species, however, continues to include species whose primary ranges are outside of the United States.

Defenders brought this action to challenge the new regulation. Count I alleged that the Secretary violated section 7(a) of the Act [1] by not providing listed endangered species the full protection guaranteed them, and that the new regulation "threatens imminently and irreparably" Defenders' interests and the interest of the public in the continued application of section 7 of the Act to agency action abroad. Count II alleged that the Secretary's action in promulgating

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[1] The Act includes a citizen suit provision, 16 U.S.C. § 1540(g), which states in pertinent part:

> (1) Except as provided in paragraph (2) of this subsection any person may commence a civil suit on his own behalf—
>
> > (A) to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof; * * * * * * *
>
> The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce any such provision or regulation, or to order the Secretary to perform such act or duty, as the case may be.

the new regulation was arbitrary, capricious, an abuse of discretion and contrary to law in violation of the Administrative Procedure Act, 5 U.S.C. § 553 and § 701 et seq. Count III alleged that the Secretary violated a statutory duty to conserve endangered and threatened species whose primary ranges are in foreign lands. Defenders asked for a declaratory judgment that the rule was illegal; for injunctive relief enjoining implementation of the new rule; and "that the Court direct defendant to perform the duties owed plaintiffs, specifically to publish forthwith regulations requiring federal agencies to consult on agency actions abroad that may affect endangered or threatened species." First Amended Complaint at 11.

The Secretary moved to dismiss the complaint for lack of subject matter jurisdiction on the ground that Defenders had not alleged the existence of a case or controversy and lacked standing to bring the action. The district court agreed that Defenders had not shown a sufficient injury that was traceable to the Secretary's new regulation and thus dismissed the action for lack of jurisdiction.

II.

Article III of the Constitution limits the power of the federal courts to actual "cases" and "controversies." U.S. Const. art. III, § 2. One purpose of the "cases or controversies" requirement is to ensure that the courts will not intrude into areas committed to other branches of government. *Allen v. Wright*, 468 U.S. 737, 750 (1984). The doctrines that stem from Article III, such as standing, mootness, ripeness, and political question, relate "to an idea, which is more than an intuition but less than a rigorous and explicit theory, about the constitutional and prudential limits to the powers of an unelected, unrepresentative judiciary in our kind of government." *Vander Jagt v.*

O'Neill, 699 F.2d 1166, 1178-79 (D.C. Cir. 1982) (Bork, J., concurring), *cert. denied*, 464 U.S. 823 (1983).

Standing is an aspect of justicibility that focuses on the party seeking to bring his complaint before a federal court. "[W]hen standing is placed in issue in a case, the question is whether the person whose standing is challenged is a proper party to request an adjudication of a particular issue and not whether the issue itself is justiciable." *Flast v. Cohen*, 392 U.S. 83, 99-100 (1968). To be a proper litigant, the party must have " 'alleged such a personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues.' " *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 72 (1978) (quoting *Baker v. Carr*, 369 U.S. 186, 204 (1962)). The Supreme Court summarized the constitutional requirements of standing in *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464 (1982):

> [A]t an irreducible minimum, Art. III requires the party who invokes the court's authority to "show that he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant," *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979), and that the injury "fairly can be traced to the challenged action" and "is likely to be redressed by a favorable decision," *Simon v. Eastern Kentucky Welfare Rights Org.*, 426 U.S. 26, 38, 41 (1976).

Id. at 472.

In addition to the constitutional requirements, courts have imposed prudential or policy limitations on a litigant's standing to bring a claim. For example, a plaintiff cannot assert the rights or interests of third parties. *Warth v. Seldin*, 422 U.S. 490, 499 (1975). Also, a court will not decide "abstract questions of wide public significance" most appropriately addressed by the legislature. *Id.* at 500. Furthermore, the plaintiff's complaint must fall within "the zone of interests" to be protected by the statute at issue. *Association of Data Processing Serv. Orgs. v. Camp*, 397 U.S. 150, 153 (1970).

Unlike the constitutional requirements, Congress may eliminate the prudential limitations by legislation. *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. at 100. Where "Congress has authorized public officials to perform certain functions according to law, and has provided by statute for judicial review of those actions under certain circumstances, the inquiry as to standing must begin with a determination of whether the statute in question authorizes review at the behest of the plaintiff." *Sierra Club v. Morton*, 405 U.S. 727, 732 (1972). In this case, the ESA provides that "any person" may commence a suit to enjoin any person who is alleged to be in violation of the ESA. *See* 16 U.S.C. § 1540(g). Environmental associations are "persons" and may bring suit in their own name. *Id.* at § 1532(13). Defenders therefore need meet only the constitutional requirements for standing for their claims under the ESA.[2]

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[2] Defenders have also alleged a violation of section 702 of the Administrative Procedure Act (APA), 5 U.S.C. § 702 (Supp. II 1982), which provides that persons "adversely affected or aggrieved by agency action within the meaning of a

A. Injury in Fact

We turn first to consider the requirement of injury in fact. A threatened injury may constitute an injury in fact. *Valley Forge*, 454 U.S. at 472. The Supreme Court has recognized allegations of threatened injury on two situations. The first situation "involves cases in which the plaintiff alleges that governmental action will be taken directly against him." *Wilderness Society v. Griles*, 824 F.2d 4, 11 (D.C. Cir. 1987) (analyzing Supreme Court cases on threatened injury). For example, in *Abbott Laboratories v. Gardner*, 387 U.S. 136 (1967), drug manufacturers sought pre-enforcement review of regulations concerning labels and advertisements for prescription drugs, arguing that the Commissioner had exceeded his statutory authority. *Id.* at 138-39. The Court reasoned that the issue of statutory construction is a purely legal question and that plaintiffs had demonstrated that the clash between the government and the plaintiff was sufficiently immediate and direct. *Id.* at 149-52.

The second situation involves "cases in which the government acts directly against a third party, whose expected response in turn will injure the plaintiff." *Wilderness Society v. Griles*, 824 F.2d at 11. There,

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relevant statute" may bring suit to challenge a final agency action. Under the APA, plaintiffs must show that "the challenged action[] caused them 'injury in fact,' and that the alleged injury was to an interest 'arguably within the zone of interests to be protected or regulated' by the statutes that the agencies were claimed to have violated." *Sierra Club v. Morton*, 405 U.S. at 733. *See also Japan Whaling Ass'n v. American Cetacean Society*, 106 S. Ct. 2860, 2866 n.4 (1986). An interest in preserving endangered species is directly within the zone of interests of the ESA.

the inquiry is whether "the third party's response to the challenged governmental action will injure the plaintiff at all." *Id.* The facts of this case fit into the second situation. The Secretary has issued regulations that provide that agencies funding projects abroad need not consult with the Secretary about the projects' impact on endangered species. The agencies are third parties whose actions in proceeding with projects without considering the projects' effects on endangered species will allegedly injure Defenders.

In their complaint, Defenders stated that:

> Plaintiffs and their members have an interest in the enforcement and administration of the Endangered Species Act, 16 U.S.C. §§ 1531 *et seq.*, and observe and enjoy, when possible, endangered and threatened species of wildlife, incuding [sic] those species whose primary ranges are outside the United States. The actions of the defendant harm in fact the plaintiffs by, among other ways, increasing the rate of extinction of endangered and threatened species, species whose presence on earth the plaintiffs observe and enjoy.

First Amended Complaint ¶ 5. Defenders submitted affidavits listing pending and ongoing projects in foreign countries that may be harming endangered species.

The district court found that Defenders had asserted merely an interest in the enforcement and administration of the ESA. The Supreme Court "has repeatedly held that an asserted right to have the Government act in accordance with law is not sufficient, standing alone, to confer jurisdiction on a federal court." *Allen v. Wright*, 468 U.S. at 754. *See*

also, Valley Forge Christian College v. Americans United for Separation of Church and State, Inc., 454 U.S. at 482; *Schlesinger v. Reservists Committee to Stop the War*, 418 U.S. 208, 223 n.13 (1975). Here, however, Defenders also alleged that specific projects in foreign countries which their members had visited were increasing the rate of extinction of endangered species. An interest in aesthetic, conservational, and recreational values will support standing when an organizational plaintiff alleges that its members use the area and will be adversely affected. *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 702 (1973); *Sierra Club v. Morton*, 405 U.S. at 734-35.

Defenders also argue that the Secretary's refusal to carry out a statutorily mandated procedure constitutes sufficient injury in fact to confer standing. Defenders rely on *Watt v. Energy Action Educational Found.*, 454 U.S. 151 (1981), where the plaintiffs alleged that the Secretary of the Interior had breached a statutory obligation to experiment with various bidding systems for leasing tracts of the outer continental shelf. The plaintiffs had standing to challenge the Secretary's refusal to experiment with various bidding systems because the relief requested—an injunction prohibiting further lease sales until the Secretary issued regulations for alternative bidding systems—would result in the Secretary using the best bidding system. *Id.* at 162. In the present case, however, the Secretary correctly points out that in *Watt* the plaintiffs had alleged an economic, not a procedural, injury.

Various courts of appeals have held that agency violations of procedural rights constitute injury in fact. In *Trustees for Alaska v. Hodel*, 806 F.2d 1378

(9th Cir. 1986), five environmental groups filed an action for declaratory and injunctive relief against the Department of the Interior to require the Department to follow all necessary public participation procedures in preparing an environmental impact statement under the National Environmental Policy Act of 1969 (NEPA) before submitting a report to Congress with recommendations concerning possible exploration of oil and gas within the coastal plain. *Id.* at 1379-80. The Department contended that mere speculation on the contents of the report did not confer standing. The Ninth Circuit disagreed, holding that the environmental groups had standing to challenge alleged agency violations of procedural rights. *Id.* at 1380. *See also Oregon Environmental Council v. Kunzman*, 817 F.2d 484, 491 (9th Cir. 1987) (procedural defects in environmental impact statement (EIS) preparation create risk that environmental impacts will be overlooked and constitute injury in fact); *Munoz-Mendoza v. Pierce*, 711 F.2d 421, 428 (1st Cir. 1983) (failure to make allegedly mandatory study is procedural error).

The Secretary does not contest that a proecdural injury may be a judicially cognizable injury in fact. Instead, he responds that Defenders did not allege a procedural injury in their complaint. We disagree. Defenders alleged that they and their members have an interest in the enforcement and administration of the ESA. First Amended Complaint ¶ 5. In their prayer for relief, Defenders requested that "the Court direct defendant to perform the duties owed plaintiffs, specifically to publish forthwith regulations requiring federal agencies to consult on agency actions abroad that may affect endangered or threatened species." *Id.* at 11. We conclude that Defend-

ers have pleaded a procedural harm as well as harm in the increased rate of extinction of endangered species.

B. Fairly Traceable and Likely to be Redressed

The Secretary concedes that physical damage to a place an individual personally visits or to animals he actually observes is a type of injury sufficient to confer standing under Article III. The parties disagree over whether this injury to the Defenders' professional and aesthetic interests in the existence of endangered species is traceable to the Secretary's action in promulgating the new regulation and whether the injunctive relief sought will redress the complained-of injury.

The district court raised questions concerning the projects that the Defenders listed as increasing the rate of extinction of endangered species. Several of the projects were funded by the World Bank, which is not a federal agency. Other projects had been halted or completed. None of the projects was initiated subsequent to the publication of the new rule. The district court therefore concluded that no harm could have yet resulted from the new rule.

On appeal, Defenders argue that harm has resulted from the new rule because no consultation was ever done on the ongoing Mahaweli project in Sri Lanka, funded by the Agency for International Development (AID). Eight endangered species—the Indian elephant, leopard, purple-faced langur, toque macaque, red-face malkoha, Bengal monitor, mugger crocodile, and python—are found in the project area. Although there is a continuing need for consultation, under the new rule AID will never be compelled to consult with the Secretary about the project's effect on en-

dangered species. A member of Defenders who has visited the area of the Mahaweli project for the purpose of observing its wildlife will be injured.

The district court also reasoned that consultation might have already occurred. In ruling on a motion to dismiss for want of standing, however, the court "must accept as true all material allegations of the complaint, and must construe the complaint in favor of the complaining party." *Warth v. Seldin*, 422 U.S. at 501. Defenders' affidavits attached to the complaint alleged that for the ongoing Mahaweli project, no section 7 consultation has ever been conducted. Accordingly, it was inappropriate for the district court to surmise that consultation might already have occurred.

Additionally, reinitiation of formal consultation is required when "new information reveals effects of the action that may affect listed species or critical habitat in a manner or to an extent not previously considered." *Sierra Club v. Marsh*, 816 F.2d 1376, 1387 (9th Cir. 1987) (emphasis deleted) (quoting 50 C.F.R. § 402.16(b)). Defenders cited AID's Picchis-Palcazu community forestry project in Peru as threatening harm to endangered species, including the jaguar, uakari, and Geoldi's marmoset. Also, the Bureau of Reclamation has a nine-year commitment (1982-1991) to aid in the rehabilitation of the Aswan High Dam on the Nile in Egypt. This project threatens the endangered Nile crocodile. Thus, even in the ongoing projects in which consultation has occurred, changed circumstances could require additional consultation. We therefore conclude that the district court should not have rejected as irrelevant the projects that Defenders identified on the ground that none was initiated subsequent to the promulation of the new rule.

The district court found that the threatened harm from current and pending projects failed to meet the causation requirement for two additional reasons: (1) there was no indication that the projects would affect endangered or threatened species; and (2) the Defenders had not sought to enjoin the action agency.

Defenders argue that a litigant's standing to challenge the new regulation does not depend on proof that the projects will harm endangered or threatened species. Implicit in Defenders' allegation of procedural injury is the creation of a risk that harm to endangered species may be overlooked by an agency's failure to consult. Defenders correctly point out that the district court's reasoning would require the environmental groups to conduct their own independent investigation before commencing an action. The Ninth Circuit rejected a similar requirement under the NEPA:

> Were we to agree with the district court that a NEPA plaintiff's standing depends on "proof" that the challenged federal project will have particular environmental effects, we would in essence be requiring that the plaintiff conduct the same environmental investigation that he seeks in his suit to compel the agency to undertake. Compliance with NEPA is a primary duty of every federal agency; fulfillment of this vital responsibility should not depend on the vigilance and limited resources of environmental plaintiffs. It is the federal agency, not environmental action groups or local government, which is required by NEPA to produce an EIS.

City of Davis v. Coleman, 521 F.2d 661, 670-71 (9th Cir. 1975) (footnote omitted).

In arguing that Defenders have not proved the necessary causation, the Secretary relies on *Allen v. Wright*, 468 U.S. 737 (1984). There, the Supreme Court held that parents of black children attending public schools lacked standing to challenge the sufficiency of Internal Revenue Service regulations that would deny tax-exempt status to racially discriminatory private schools. The chain of causation between the regulations and the plaintiffs' diminished ability to have their children educated in a racially integrated public school was found to be too speculative and indirect to support standing and depended on the independent actions of various third parties not before the court. The plaintiffs had not shown that "there were enough racially discriminatory private schools receiving tax exemptions" in the community to make a difference. *Id.* at 758. Also, it was entirely speculative "whether withdrawal of a tax exemption from any particular school would lead the school to change its policies" or "whether any given parent of a child attending such a private school would decide to transfer the child to public school as a result" of any change in policy. *Id.*

The Secretary argues that to establish traceability in this case, Defenders must show that the new regulation caused the action agencies not to consult with the Secretary and that the failure to consult led to programs being designed in a way that would harm endangered species. He argues that it is mere speculation that consultation would have made any difference, noting that in two of the projects, AID conducted its own environmental assessment. Additionally, the final design of the project depends on the independent actions of the host countries, who are third parties not before the court.

Furthermore, the Secretary argues that to prove redressability, Defenders must show that an injunction requiring the Secretary to issue a regulation requiring consultation on foreign projects would actually result in consultation, which in turn would result in a change in the project. The Secretary argues that an injunction against the new rule would not directly force the agencies to consult because the agencies' obligations stem from the ESA itself, not the regulation.

Defenders respond that the Secretary's reliance on *Wright*, a taxpayer case, is unfounded. They contend that this case is more akin to *United States v. SCRAP*, 412 U.S. 669 (1973), and other environmental cases. In *SCRAP*, an environmental association challenged the Interstate Commerce Commission's failure to suspend a surcharge on railroad freight rates as violative of the Commission's statutory duty, on the ground that it had failed to file a detailed environmental impact statement. *United States v. SCRAP*, 412 U.S. at 679. The Court acknowledged that, in contrast to the situation in *Sierra Club v. Morton*, it was being asked to follow a "more attenuated line of causation" from the increased rates to their economic, recreational and aesthetic harm. *Id.* at 688.

> [A] general rate increase would allegedly cause increased use of nonrecyclable commodities as compared to recyclable goods, thus resulting in the need to use more natural resources to produce such goods, some of which resources might be taken from the Washington area, and resulting in more refuse that might be discarded in national parks in the Washington area.

Id. Notwithstanding this rather tenuously linked chain of causation, the Court held that the plaintiffs had standing. *Id.*

We agree with Defenders that the facts of this case are more like *SCRAP* than *Allen v. Wright.* Significantly, *Allen v. Wright* involved a constitutional challenge, whereas this case involves, as did *SCRAP*, questions of statutory interpretation. Commentators have noted that if a "plaintiff is protesting a claimed invasion of a generalized constitutional injury, the Court appears to be more reluctant to find standing * * * than in cases where the plaintiff is arguably within the zone of interests protected by a federal statute, or a statute appears to grant standing in the case." 1 R. Rotunda, J. Nowak & J. Young, *Treatise on Constitutional Law* 129-30 (1986). Unlike *Allen v. Wright*, Congress has in this case granted standing to "any person" to enforce the ESA.

One rationale used to support a finding of causation in cases challenging agency regulations is that Congress itself has legislated the requisite causation and redressability. *See Center for Auto Safety v. NHTSA*, 793 F.2d 1322, 1334-35 (D.C. Cir. 1986); *see generally*, Wald, *The D.C. Circuit: Here and Now*, 55 Geo. Wash. L. Rev. 718, 723 (1987) (discussing separation of powers issues relating to standing). In *Center for Auto Safety*, consumer associations challenged the agency's failure to promulgate stringent fuel efficiency regulations, as required by the Energy Policy and Conservation Act of 1975. The organization alleged that its members were injured by being deprived of the opportunity to purchase fuel efficient cars. The agency countered that the regulation would have no practical effect on the types of vehicles available. The court found standing on the ground that

Congress had determined that the automobile industry would comply with more stringent fuel efficiency standards instead of paying fines. "If setting a higher standard cannot result in vehicles with increased fuel efficiency, then the entire regulatory scheme is pointless." *Id.*

We agree with Defenders' contention that Congress has determined that the remedy for the harm to their members' personal, professional, and aesthetic interest in endangered species is consultation between the Secretary and the action agency. Thus, the same considerations that supported the finding of standing in *Center for Auto Safety* are present here.

Finally, we disagree with the district court's reasoning that the Defenders should have enjoined the agency action rather than the new regulation. We see no reason to require Defenders to seek to enjoin the construction of a project. We are satisfied that an injunction requiring the Secretary to publish regulations mandating that federal agencies consult on agency actions abroad would result in consultation, which in turn would foreclose the possibility that serious harm to endangered species will be overlooked.

The order dismissing the complaint is reversed and the case is remanded to the district court for further proceedings consistent with this opinion.

BOWMAN, Circuit Judge, dissenting.

I respectfully dissent from the Court's slightly surrealistic holding that the plaintiffs have standing to maintain this lawsuit. The constitutional requirements for standing compel, it seems to me, the opposite result. The Supreme Court of the United States has stated that, at an irreducible minimum, Article III requires plaintiffs to allege personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief. *See Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982). This irreducible minimum is a "core component derived directly from the Constitution." *Allen v. Wright*, 468 U.S. 737, 751 (1984).

Plaintiffs therefore must show that their alleged injury (increased likelihood of diminished opportunities to enjoy viewing endangered species in foreign lands) is traceable to the defendant's allegedly unlawful conduct and that the relief requested will redress the injury. I part company with the majority at this point in the analysis because I do not believe that plaintiffs have made this showing.

As to the traceability requirement, I believe that the purported causal link between the challenged regulation and any harm to endangered species in foreign lands is far too speculative, attenuated, and remote to support standing. The Endangered Species Act (ESA) does not give the Secretary the power to order an action agency to comply with his requests or to veto its decision. *See Sierra Club v. Marsh*, 816 F.2d 1376, 1386 (9th Cir. 1987). Nor does the Secretary have any power to direct the actions or decisions of a foreign country. Even if the action agency

independently decided to forego participation in a foreign project, it is entirely speculative whether the host nation would abandon its plans to seek the withdrawn aid, be it funding or technical assistance, from another source. "[U]nadorned speculation will not suffice to invoke the federal judicial power." *Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 44 (1976).

It is no answer in this case to say that the Secretary's alleged failure to comply with the statute (by not requiring the action agencies to consult with him on foreign projects) creates the risk that harm to endangered species may be overlooked by an agency's failure to consult. *See* ante at 12. The ESA itself, independent of the regulations promulgated thereunder, imposes an obligation on the agencies that assist overseas projects to insure that their actions are not likely to jeopardize the continued existence of any threatened species. *See* 16 U.S.C. § 1536(a)(1)-(2). The consultation process, or the lack thereof, in no way diminishes this duty.[1]

As to the redressability requirement, I cannot discern how the relief that plaintiffs seek would effectively address their alleged injury. As previously mentioned, even if the Secretary is ordered to require the action agencies to consult with him regarding foreign ventures, the action agency and the host nation still would be legally entitled to exercise their independent judgment concerning proposed projects.

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[1] The record demonstrates that the action agencies take this duty very seriously. The claim that formal consultation with the Secretary would have any impact on the concern of these agencies for the protection of endangered species or their actual decisions on particular projects is at best conjectural.

Further, regardless of the availability of consultation, the action agency has a duty under the ESA to insure the environmental soundness of its operations.

The Court's response to these concerns is the assertion that "Congress itself has legislated the requisite causation and redressability." *Ante* at 15. Even accepting as correct, as the Court does, *ante* at 16, plaintiffs' "contention that Congress has determined that the remedy for the harm to their members' personal, professional, and aesthetic interest in endangered species is consultation between the Secretary and the action agency," it does not follow that plaintiffs have satisfied the constitutional requirements for standing. For it is the courts, not Congress, which must decide whether Article III, Section 2 of the Constitution has been satisfied in the circumstances of the particular case. We cannot satisfy this duty by deciding that Congress may have intended for us to exercise jurisdiction—an intention, by the way, that is far from clear; we must decide that the Constitution authorizes us to do so.

Read literally, the citizen suit provision of ESA, 16 U.S.C. § 1540(g), authorizes "any person" to bring suit to enjoin "violation of any provision [of ESA] or regulation issued under the authority thereof." This provision does not advert in any way to any of the constitutional requirements for standing. To construe section 1540(g) as the Court does is to attribute to Congress the unexpressed intent to dispense with standing requirements entirely, and to allow "any person" to sue for an injunction against "violation of any provision" of ESA or its regulations. Surely Congress did not intend this provision to be read in a vacuum, without regard to constitutional limitations.

For the reasons adumbrated above, I would affirm the decision of the District Court dismissing this action for lack of standing.

A true Copy.

Attest:

Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

3-86 CIV 757

DEFENDERS OF WILDLIFE, FRIENDS OF ANIMALS AND THEIR ENVIRONMENT, and THE HUMANE SOCIETY OF THE UNITED STATES, PLAINTIFFS

v.

DONALD P. HODEL, as Secretary of the Interior, DEFENDANT

MEMORANDUM ORDER

[Filed Feb. 25, 1987]

This matter comes before the court on defendant Secretary of the Interior's motion to dismiss. In support of his motion, the Secretary argues that the

court lacks jurisdiction because the issues raised by the plaintiffs are not justiciable. Specifically, the Secretary alleges that the plaintiffs' have not alleged the existence of a case or controversy and lack standing to bring this action.

BACKGROUND

The underlying dispute presented by this case concerns the validity of the Secretary's action in rescinding a rule that required federal agencies to consult with the defendant when agency action abroad might affect species of wildlife or plants listed by the Secretary as endangered or threatened. In 1973, Congress enacted the Endangered Species Act (ESA), 16 U.S.C. § 1531 et seq., to facilitate conservation of endangered and threatened species. Section of the Act, 16 U.S.C. § 1533, requires the Secretary to list the species of wildlife and plants endangered or threatened with extinction. The list established by the Secretary contains both domestic and international wildlife and plants. *See* 50 C.F.R. § 17.11 (Oct. 1985). Section 7(a)(2) of the Act, 16 U.S.C. § 1536(a)(2), imposes a duty on federal agencies to consult with the Secretary to insure that action authorized, funded, or carried out by federal agencies is "not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species . . . ."

Initially the Secretary interpreted Section 7 as requiring consultation when federal agencies authorized, funded, or carried out projects in foreign countries.[1] 50 C.F.R. § 402.04 (Oct. 1984). On

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[1] The Secretary also requires Section 7 consultation when federal agencies authorize, fund, or carry out projects within the United States and on the high seas.

June 3, 1986, the Secretary published a final rule that modified the scope of Section 7. The new rule rescinded the requirement for Section 7 consultation when agency action occurred in foreign countries. 51 Fed. Reg. 19930 (1986).

The plaintiffs argue that the reinterpretation of Section 7 through the 1986 rulemaking is invalid on its face as contrary to the provisions of the ESA. The plaintiffs were unable to refer to any specific agency action in a foreign country initiated subsequent to the publication of the rule modifying the Secretary's interpretation of Section 7. Instead, the plaintiff directs the court's attention to several ongoing projects in foreign countries, all of which were initiated prior to the June 3, 1986, publication date.

DISCUSSION

The issue raised by the defendant's motion concerns whether the plaintiffs' claims satisfy the "case and controversy" requirement of Article III Section 2 of the Constitution.[2] Article III limits the "judicial

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[2] The defendant also raises prudential or policy limitations to asserting jurisdiction over the plaintiffs claims. Specifically, defendant argues that the court should decline to assert jurisdiction over the plaintiffs' claims because the plaintiffs' injuries do not fall within the zone of interest protected by the ESA, the plaintiffs are asserting generalized grievances, and plaintiffs are raising a third-person's legal rights. *See generally Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 475 (1982). Because Congress has expressly augmented standing in the ESA, 16 U.S.C. § 1504(g), *see National Wildlife Federation v. Coleman*, 400 F. Supp, 705, 710 (D. Mass. 1975), *rev'd on other grounds*, 529 F.2d 359 (5th Cir. 1976), *cert. denied*, 429 U.S. 979, the court lacks authority to create prudential barriers to standing in lawsuits

power" of federal courts to the resolution of "cases" and "controversies". *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 471 (1982). "The power to declare the rights of individuals and to measure the authority of governments . . . 'is legitimate only in the last resort, and as a necessity in the determination of a real, earnest, and vital controversy.'" *Id.* (quoting *Chicago & Grand Trunk Co. v. Wellman*, 143 U.S. 339, 345 (1892)).

The aspect of the case and controversy requirement that is brought into focus by the instant motion is standing. The Supreme Court has recently clarified the "irreducible minimum" a plaintiff must show in order to satisfy the standing requirement of Article III in *Valley Forge*. A plaintiff must "show that he personally has suffered some actual or threatened injury as a result of the punitively [*sic*] illegal conduct of the defendant, and that the injury can be fairly traced to the challenged action and is likely to be redressed by a favorable decision."[3] 454 U.S. at 472 (citations omitted). Relevant inquiries when determining standing in a particular case include:

> Is the injury too abstract or otherwise not appropriate, to be considered judicially cognizable? Is the line of causation between the illegal con-

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brought to enjoin violations of the Act. *See, e.g., Havens Realty Corp. v. Coleman*, 455 U.S. 363, 372 (1982); *Gladstone Realtors v. Village of Bellwood*, 441 U.S. 91, 100 (1979). Congress may not, however, abrogate the constitutional aspect of the standing requirement. *Gladstone Realtors*, 441 U.S. at 100.

[3] In addition to the constitutional component, the standing doctrine embraces prudential considerations which were discussed in footnote 1.

> duct and injury too attenuated? Is the prospect for obtaining relief from the injury as a result of a favorable ruling too speculative?

Allen v. Wright, 468 U.S. 737, 752 (1984).

Relying on much of the above-cited authority, the Secretary argues that the plaintiff has failed to show an actual or threatened injury as the result of the Secretary's reinterpretation of Section 7. The plaintiffs proffer two arguably separate and distinct sets of injuries,[4] neither of which, for reasons discussed below, is sufficient to satisfy the standing requirement of Article III.

The first of the plaintiffs' injuries is the only injury expressly stated in the plaintiffs' complaint. For purposes of ruling on this motion to dismiss, the court must accept as true all material allegations in the complaint, and must construe the complaint in favor of the complaining party. *Warth v. Seldin*, 422 U.S. 490, 501 (1974). In their complaint, plaintiffs state that members of their organization benefit both professionally and personally from observing endangered and threatened species of wildlife and plants whose primary range are outside the United States. Therefore, they argue, they have an interest in the

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[4] In addition to their alleged injuries, plaintiffs offer several practical reasons why the court should hear this case. First, plaintiffs emphasize that the issue raised by their complaint is one of law, and is appropriate for judicial resolution. Second, because the scope of the lawsuit is purely legal, a factual record or factual setting is unnecessary. Finally, the plaintiffs have a strong and intense interest in protecting endangered species. Even these practical considerations, standing alone or when combined, cannot overcome the requirements of Article III.

enforcement and administration of the ESA. (Amended Complaint ¶ 2).

Although there is no precise definition of injury in fact, comparing the allegations in this complaint to those made in prior standing cases clearly demonstrates the insufficiency of the above-mentioned "injury". *See, e.g., Allen v. Wright*, 468 U.S. 737, 754 (1984) (Court has repeatedly held that an asserted right to have Government act in accordance with law is not sufficient to satisfy standing requirement); *Valley Forge*, 454 U.S. at 483-84 (plaintiffs lacked standing to require that Government be administered according to law); *Sierra Club v. Morton*, 405 U.S. 727, 739 (1972) (mere interest in the problem of environmental protection is insufficient to confer standing). Ignoring the above-cited authority, plaintiffs have merely alleged an interest in the proper enforcement of the ESA to insure that endangered species are fully protected. The amended complaint fails to allege any specific agency action in foreign countries that have adversely affected endangered species as the result of the Secretary's reinterpretation of Section 7. Accordingly, the court concludes that the plaintiffs interest in proper enforcement of the ESA, however admirable, is not a sufficient injury for purposes of Article III standing.

Apparently realizing the standing deficiencies in their complaint, plaintiffs have attempted to establish a record of additional injuries or set of injuries.[5] In the memorandum in opposition to defendants motion, plaintiffs list eight projects which they allege are ongoing projects in foreign countries that are

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[5] It is within the court's authority to allow the plaintiffs to supply, by amendment to the complaint or by affidavit, further particularized allegations deemed supportive of plaintiffs' standing. *Warth*, 422 U.S. at 501.

harming endangered species. Of these eight, only three are ongoing projects that are actually being funded or carried out by federal agencies.[6] A fourth project, the Lower Mekong Project, is being planned by the Bureau of Reclamation. In addition to the above-mentioned projects, the plaintiffs direct the court's attention to a Bureau of Reclamation document detailing various projects in foreign countries that the Bureau is involved in. The Bureau's involvement in most of these projects is limited to studying, planning, or technical advice.

The plaintiffs note that under the new regulation the federal agencies involved in the above-cited ongoing and planned projects no longer have a continuing duty to consult with the Secretary. Consequently, the plaintiffs argue that these projects provide a sufficient actual or threatened injury to satisfy the standing requirement of Article III, Section 2.[7]

Plaintiffs rely on *Tennessee Valley Authority v. Hill*, 437 U.S. 153 (1979), in support of their argument that federal agencies have a continuing duty to consult with the Secretary during the pendency of foreign projects. In *Tennessee Valley Authority*, plaintiffs sought to enjoin the completion of the Tel-

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[6] The Nam Choan Dam and the Temenggor Dam projects were funded by the World Bank, which is not a federal agency. The Tembeling River Dam Project has been halted. The Itaipu Dam was completed in 1983.

[7] The plaintiffs do not clearly articulate how the failure to consult with the Secretary during the pendency of these projects injures them. Presumably, the absence of consultation during the pendency of these projects raises a potential for harm to endangered species because the agencies are unaware of or insensitive to the environmental effects of their actions.

lico Dam claiming that such action would violate the ESA by causing the snail darters[']extinction. The consultation aspect of Section 7 was not the focus of the litigation. The Tennessee Valley Authority (TVA) consulted with the Secretary, and the Secretary clearly stated that completion of the dam would result in total destruction of the snail darters[']critical habitat. *Id.* at 161-62. It was TVA's position, however, that the ESA did not apply to the dam because the project was initiated before the ESA became effective and Congress continued to appropriate funds to the dam following the effective date of the ESA despite their knowledge that the dam would affect the snail darters[']existence. The Court enjoined the completion of the dam holding that TVA's Section 7 duty to insure that actions authorized, funded, or carried out by them do not jeopardize the continued existence of endangered species or result in the destruction or modification of habitat of such species applied to the Tellico Dam.

Contrary to the plaintiffs' assertion otherwise, *Tennessee Valley Authority* stands for the proposition that federal agencies have a continuing duty during the pendency of a project to insure that the project does not jeopardize endangered species. The parties did not raise and the court did not address the issue of continuing consultation.

For reason [*sic*] discussed below, neither the ongoing projects or the projects detailed in the Bureau of Reclamation document, provide a sufficient basis for showing an actual or threatened injury traceable to the Secretary's reinterpretation of Section 7. First, there is no indication that the projects summarized in the Bureau of Reclamation document will affect endangered or threatened species of wildlife or plants,

or, as to most of the projects, when they would begin. Second, it is entirely possible that Section 7 consultation has occurred at the initial or latter stages of both the ongoing and planned projects.[8] After consulting with the Secretary, the final decision of whether to proceed or continue with a project lies with the acting agency. *National Wildlife Federation v. Coleman*, 529 F.2d 359 (5th Cir. 1976); *Sierra Club v. Forehlke*, 534 F.2d 1289 (8th Cir. 1976). Consequently, additional consultation, absent changed circumstances, would be meaningless.

Third, even assuming for purposes of this motion that, in addition to the initial Section 7 consultation, federal agencies have a duty to consult with the Secretary during the pendency of agency action in a foreign country, plaintiffs have not sought to enjoin the agency action that they contend is allegedly causing them harm. (The Mahaweli Project is allegedly harming leopards and elephants; the Picchis-Palcazu Project is allegedly harming jaguars and marmusets; the Aswan Dam Project is allegedly harming the Nile crocodile.) Instead, the plaintiffs would have the court construe the ESA in the abstract. The court believes, however, that limited judicial resources counsel against deciding cases when the plaintiff has failed to request a remedy that will redress the injury the plaintiff is relying on to show standing. If after accepting jurisdiction and determining that the

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[8] This possibility is enhanced by the information that the Agency for International Development funded the preparation of environmental assessments for both the Mahaweli River Basin Project and the Picchis-Palchazu Forestry Project which lead [*sic*] to alternative or additional action to minimize or eliminate the effect on endangered species. (Cohen affidavit at 2-3).

Secretary's reinterpretation of Section 7 was invalid the Secretary and the relevant federal agencies did not voluntarily initiate consultation regarding the Mahaweli, Picchis-Palcazu, and Aswan Dam projects, the plaintiffs would have to bring a second lawsuit to enjoin the agency action as it relates to those particular projects. The plaintiff is not required, of course, to correct all alleged violations of the ESA in one lawsuit. But requesting a remedy that alleviates at least some of the plaintiffs' alleged harm is a more efficient use of judicial resource and is part of the purpose underlying the standing requirement. *See Duke Power Co. v. Carolina Environmental Study Group, Inc.*, 438 U.S. 59, 79 (1978) (standing requires that plaintiffs alleged injuries that are likely to be redressed by the requested relief). Accordingly, the court concludes that the plaintiffs have failed to satisfy the standing requirement of Article III, Section 2.

Based upon the record as presently constituted,

IT IS ORDERED That defendant's motion to dismiss its granted and that plaintiffs' action shall be dismissed for lack of standing.

DATED: February 25, 1987.

/s/ Donald D. Alsop
DONALD D. ALSOP
Chief U.S. District Judge

APPENDIX E

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 89-5192/5386MN

DEFENDERS OF WILDLIFE, FRIENDS OF ANIMALS AND THEIR ENVIRONMENT; AND THE HUMANE SOCIETY OF THE UNITED STATES, APPELLEES

vs.

MANUEL LUJAN, as Secretary of the Interior, APPELLANT

ORDER DENYING PETITION
FOR REHEARING AND SUGGESTION
FOR REHEARING EN BANC

Appellant's suggestion for rehearing en banc has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc. Judges Bowman and Beam would have granted the petition.

Petition for rehearing by the panel is also denied.

December 10, 1990

Order Entered at the Direction of the Court:

/s/ Robert D. St. Vrain
Clerk, U.S. Court of Appeals, Eighth Circuit

APPENDIX F

STATUTORY AND REGULATORY PROVISIONS INVOLVED

1. Section 2 of the Endangered Species Act of 1973 (ESA), 16 U.S.C. 1531, provides:

Congressional findings and declaration of purposes and policy

(a) Findings

The Congress finds and declares that—

(1) various species of fish, wildlife, and plants in the United States have been rendered extinct as a consequence of economic growth and development untempered by adequate concern and conservation;

(2) other species of fish, wildlife, and plants have been so depleted in numbers that they are in danger of or threatened with extinction;

(3) these species of fish, wildlife, and plants are of esthetic, ecological, educational, historical, recreational, and scientific value to the Nation and its people;

(4) the United States has pledged itself as a sovereign state in the international community to conserve to the extent practicable the various species of fish or wildlife and plants facing extinction, pursuant to—

(A) migratory bird treaties with Canada and Mexico;

(B) the Migratory and Endangered Bird Treaty with Japan;

(C) the Convention on Nature Protection and Wildlife Preservation in the Western Hemisphere;

(D) the International Convention for the Northwest Atlantic Fisheries;

(E) the International Convention for the High Seas Fisheries of the North Pacific Ocean;

(F) the Convention on International Trade in Endangered Species of Wild Fauna and Flora; and

(G) other international agreements; and

(5) encouraging the States and other interested parties, through Federal financial assistance and a system of incentives, to develop and maintain conservation programs which meet national and international standards is a key to meeting the Nation's international commitments and to better safeguarding, for the benefit of all citizens, the Nation's heritage in fish, wildlife, and plants.

(b) Purposes

The purposes of this chapter are to provide a means whereby the ecosystems upon which endangered species and threatened species depend may be conserved, to provide a program for the conservation of such endangered species and threatened species, and to take such steps as may be appropriate to achieve the purposes of the treaties and conventions set forth in subsection (a) of this section.

(c) Policy

(1) It is further declared to be the policy of Congress that all Federal departments and agen-

cies shall seek to conserve endangered species and threatened species and shall utilize their authorities in furtherance of the purposes of this chapter.

(2) It is further declared to be the policy of Congress that Federal agencies shall cooperate with State and local agencies to resolve water resource issues in concert with conservation of endangered species.

2. Section 4 of the ESA, 16 U.S.C. 1533, provides in relevant part:

Determination of endangered species and threatened species

(a) Generally

(1) The Secretary shall by regulation promulgated in accordance with subsection (b) of this section determine whether any species is an endangered species or a threatened species because of any of the following factors:

(A) the present or threatened destruction, modification, or curtailment of its habitat or range;

(B) overutilization for commercial, recreational, scientific, or educational purposes;

(C) disease or predation;

(D) the inadequacy of existing regulatory mechanisms; or

(E) other natural or manmade factors affecting its continued existence.

* * * * *

(b) Basis for determinations

(1)(A) The Secretary shall make determinations required by subsection (a)(1) of this section solely on the basis of the best scientific and commercial data available to him after conducting a review of the status of the species and after taking into account those efforts, if any, being made by any State or foreign nation, or any political subdivision of a State or foreign nation, to protect such species, whether by predator control, protection of habitat and food supply, or other conservation practices, within any area under its jurisdiction, or on the high seas.

(B) In carrying out this section, the Secretary shall give consideration to species which have been—

(i) designated as requiring protection from unrestricted commerce by any foreign nation, or pursuant to any international agreement; or

(ii) identified as in danger of extinction, or likely to become so within the foreseeable future, by any State agency or by any agency of a foreign nation that is responsible for the conservation of fish or wildlife or plants.

* * * * *

(5) With respect to any regulation proposed by the Secretary to implement a determination, designation, or revision referred to in subsection (a)(1) or (3) of this section, the Secretary shall—

(A) not less than 90 days before the effective date of the regulation—

(i) publish a general notice and the complete text of the proposed regulation in the Federal Register, and

(ii) give actual notice of the proposed regulation (including the complete text of the regulation) to the State agency in each State in which the species is believed to occur, and to each county or equivalent jurisdiction in which the species is believed to occur, and invite the comment of such agency, and each such jurisdiction, thereon;

(B) insofar as practical, and in cooperation with the Secretary of State, give notice of the proposed regulation to each foreign nation in which the species is believed to occur or whose citizens harvest the species on the high seas, and invite the comment of such nation thereon;

* * * * *

3. Section 7 of the ESA, 16 U.S.C. 1536, provides in relevant part:

Interagency cooperation

(a) Federal agency actions and consultations

(1) The Secretary shall review other programs administered by him and utilize such programs in furtherance of the purposes of this chapter. All other Federal agencies shall, in consultation with and with the assistance of the Secretary, utilize their authorities in furtherance of the purposes of this chapter by carrying out programs for the conservation of endangered

species and threatened species listed pursuant to section 1533 of this title.

(2) Each Federal agency shall, in consultation with and with the assistance of the Secretary, insure that any action authorized, funded, or carried out by such agency (hereinafter in this section referred to as an "agency action") is not likely to jeopardize the continued existence of any endangered species or threatened species or result in the destruction or adverse modification of habitat of such species which is determined by the Secretary, after consultation as appropriate with affected States, to be critical, unless such agency has been granted an exemption for such action by the Committee pursuant to subsection (h) of this section. In fulfilling the requirements of this paragraph each agency shall use the best scientific and commercial data available.

* * * * *

(e) Endangered Species Committee

(1) There is established a committee to be known as the Endangered Species Committee (hereinafter in this section referred to as the "Committee").

(2) The Committee shall review any application submitted to it pursuant to this section and determine in accordance with subsection (h) of this section whether or not to grant an exemption from the requirements of subsection (a)(2) of this section for the action set forth in such application.

(3) The Committee shall be composed of seven members as follows:

(A) The Secretary of Agriculture.

(B) The Secretary of the Army.

(C) The Chairman of the Council of Economic Advisors.

(D) The Administrator of the Environmental Protection Agency.

(E) The Secretary of the Interior.

(F) The Administrator of the National Oceanic and Atmospheric Administration.

(G) The President, after consideration of any recommendations received pursuant to subsection (g)(2)(B) of this section shall appoint one individual from each affected State, as determined by the Secretary, to be a member of the Committee for the consideration of the application for exemption for an agency action with respect to which such recommendations are made, not later than 30 days after an application is submitted pursuant to this section.

* * * * *

(g) Application for exemption; report to Committee

(1) A Federal agency, the Governor of the State in which an agency action will occur, if any, or a permit or license applicant may apply to the Secretary for an exemption for an agency action of such agency if, after consultation under subsection (a)(2) of this section, the Secretary's opinion under subsection (b) of this section indicates that the agency action would violate subsection (a)(2) of this section. An application for an exemption shall be considered initially by the Secretary in the manner provided for in this

subsection, and shall be considered by the Committee for a final determination under subsection (h) of this section after a report is made pursuant to paragraph (5). The applicant for an exemption shall be referred to as the "exemption applicant" in this section.

* * * * *

(2)(B) Upon receipt of an application for exemption for an agency action under paragraph (1), the Secretary shall promptly (i) notify the Governor of each affected State, if any, as determined by the Secretary, and request the Governors so notified to recommend individuals to be appointed to the Endangered Species Committee for consideration of such application; and (ii) publish notice of receipt of the application in the Federal Register, including a summary of the information contained in the application and a description of the agency action with respect to which the application for exemption has been filed.

* * * * *

(h) Grant of exemption

(1) The Committee shall make a final determination whether or not to grant an exemption within 30 days after receiving the report of the Secretary pursuant to subsection (g)(5) of this section. The Committee shall grant an exemption from the requirements of subsection (a)(2) of this section for an agency action if, by a vote of not less than five of its members voting in person—

(A) it determines on the record, based on the report of the Secretary, the record of

the hearing held under subsection (g)(4) of this section and on such other testimony or evidence as it may receive, that—

(i) there are no reasonable and prudent alternatives to the agency action;

(ii) the benefits of such action clearly outweigh the benefits of alternative courses of action consistent with conserving the species or its critical habitat, and such action is in the public interest;

(iii) the action is of regional or national significance; and

(iv) neither the Federal agency concerned nor the exemption applicant made any irreversible or irretrievable commitment of resources prohibited by subsection (d) of this section; and

(B) it establishes such reasonable mitigation and enhancement measures, including, but not limited to, live propagation, transplantation, and habitat acquisition and improvement, as are necessary and appropriate to minimize the adverse effects of the agency action upon the endangered species, threatened species, or critical habitat concerned.

Any final determination by the Committee under this subsection shall be considered final agency action for purposes of chapter 7 of Title 5.

* * * * *

(j) Exemption for national security reasons

Notwithstanding any other provision of this chapter, the Committee shall grant an exemption

for any agency action if the Secretary of Defense finds that such exemption is necessary for reasons of national security.

* * * * *

4. Section 8 of the ESA, 16 U.S.C. 1537, provides:

International cooperation

(a) Financial assistance

As a demonstration of the commitment of the United States to the worldwide protection of endangered species and threatened species, the President may, subject to the provisions of section 1306 of Title 31, use foreign currencies accruing to the United States Government under the Agricultural Trade Development and Assistance Act of 1954 [7 U.S.C.A. § 1691 et seq.] or any other law to provide to any foreign country (with its consent) assistance in the development and management of programs in that country which the Secretary determines to be necessary or useful for the conservation of any endangered species or threatened species listed by the Secretary pursuant to section 1533 of this title. The President shall provide assistance (which includes, but is not limited to, the acquisition, by lease or otherwise, of lands, waters, or interests therein) to foreign countries under this section under such terms and conditions as he deems appropriate. Whenever foreign currencies are available for the provision of assistance under this section, such currencies shall be used in preference to funds appropriated under the authority of section 1542 of this title.

(b) Encouragement of foreign programs

In order to carry out further the provisions of this chapter, the Secretary, through the Secretary of State, shall encourage—

(1) foreign countries to provide for the conservation of fish or wildlife and plants including endangered species and threatened species listed pursuant to section 1533 of this title;

(2) the entering into of bilateral or multilateral agreements with foreign countries to provide for such conservation; and

(3) foreign persons who directly or indirectly take fish or wildlife or plants in foreign countries or on the high seas for importation into the United States for commercial or other purposes to develop and carry out with such assistance as he may provide, conservation practices designed to enhance such fish or wildlife or plants and their habitat.

(c) Personnel

After consultation with the Secretary of State, the Secretary may—

(1) assign or otherwise make available any officer or employee of his department for the purpose of cooperating with foreign countries and international organizations in developing personnel resources and programs which promote the conservation of fish or wildlife or plants; and

(2) conduct or provide financial assistance for the educational training of foreign personnel, in this country or abroad, in fish, wildlife, or plant management, research and law enforcement and to render professional assistance abroad in such matters.

(d) Investigations

After consultation with the Secretary of State and the Secretary of the Treasury, as appropriate, the Secretary may conduct or cause to be conducted such law enforcement investigations and research abroad as he deems necessary to carry out the purposes of this chapter.

5. Section 9 of the ESA, 16 U.S.C. 1538, provides in relevant part:

Prohibited acts

(a) Generally

(1) Except as provided in sections 1535(g) (2) and 1539 of this title, with respect to any endangered species of fish or wildlife listed pursuant to section 1533 of this title it is unlawful for any person subject to the jurisdiction of the United States to—

(A) import any such species into, or export any such species from the United States;

(B) take any such species within the United States or the territorial sea of the United States;

(C) take any such species upon the high seas;

(D) possess, sell, deliver, carry, transport, or ship, by any means whatsoever, any such species taken in violation of subparagraphs (B) and (C);

(E) deliver, receive, carry, transport, or ship in interstate or foreign commerce, by any means whatsoever and in the course of a commercial activity, any such species;

(F) sell or offer for sale in interstate or foreign commerce any such species; or

(G) violate any regulation pertaining to such species or to any threatened species of fish or wildlife listed pursuant to section 1533 of this title and promulgated by the Secretary pursuant to authority provided by this chapter.

* * * * *

6. Section 11 of the ESA, 16 U.S.C. 1540, provides in relevant part:

* * * * *

(g) **Citizen suits**

(1) Except as provided in paragraph (2) of this subsection any person may commence a civil suit on his own behalf—

(A) to enjoin any person, including the United States and any other governmental instrumentality or agency (to the extent permitted by the eleventh amendment to the Constitution), who is alleged to be in violation of any provision of this chapter or regulation issued under the authority thereof; or

(B) to compel the Secretary to apply, pursuant to section 1535(g)(2)(B)(ii) of this title, the prohibitions set forth in or authorized pursuant to section 1533(d) or 1538(a)(1)(B) of this title with respect to the taking of any resident endangered species or threatened species within any State; or

(C) against the Secretary where there is alleged a failure of the Secretary to perform any act or duty under section 1533 of this title which is not discretionary with the Secretary.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce any such provision or regulation, or to order the Secretary to perform such act or duty, as the case may be. In any civil suit commenced under subparagraph (B) the district court shall compel the Secretary to apply the prohibition sought if the court finds that the allegation that an emergency exists is supported by substantial evidence.

* * * * *

7. 50 C.F.R. 402.01 provides in relevant part:

Scope.

(a) This part interprets and implements sections 7(a)-(d) [16 U.S.C. 1536(a)-(d)] of the Endangered Species Act of 1973, as amended ("Act").

* * * * *

Section 7(a)(2) of the Act requires every Federal agency, in consultation with and with the assistance of the Secretary, to insure that any action it authorizes, funds, or carries out, in the United States or upon the high seas, is not likely to jeopardize the continued existence of any listed species or results in the destruction or adverse modification of critical habitat.

8. 50 C.F.R. 402.02 provides in relevant part:

Definitions.

* * * * *

"*Action*" means all activities or programs of any kind authorized, funded, or carried out, in whole or in part, by Federal agencies in the United States or upon the high seas. Examples include, but are not limited to: (a) actions intended to conserve listed species or their habitat; (b) the promulgation of regulations; (c) the granting of licenses, contracts, leases, easements, rights-of-way, permits, or grants-in-aid; or (d) actions directly or indirectly causing modifications to the land, water, or air.

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